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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a rail or air carrier that has historically enforced a safety rule prohibiting employee drug and alcohol abuse can implement more effective detection measures without precipitating a "major dispute" subject to the lengthy dispute resolution procedures of the Railway Labor Act.

2. Whether the right to implement a drug testing program is an implied in law term of a railroad collective bargaining agreement.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Petitioner's parent company is Burlington Northern, Inc. The partially owned subsidiaries and affiliates of petitioner and petitioner's parent are:

- The Belt Railway Company of Chicago
- Butte Pipe Line Company
- Camas Prairie Railroad Company
- CBR Distribution Corporation
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- El Paso Natural Gas Company
  - BEM Holding Corporation
  - El Paso Development Company
    - Ex-Mission Ranches, Inc.
    - Windjammer, Inc.
  - El Paso Gas Marketing Company
  - El Paso Hydrocarbons Company
    - El Paso Frontera Corporation
    - El Paso Gas Transportation Company
    - El Paso Storage Company
      - West Lake Natural Gasoline Company
    - Odessa Natural Gasoline Company
    - Odessa Pipeline Company
    - Pecos Company
  - El Paso Mojave Pipeline Company
  - El Paso Natural Gas Clearinghouse Company
  - El Paso Production Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- Longview Switching Company
- M T Properties, Inc.

National Exchange, Inc.
    National Exchange Satellite, Inc.
New Mexico and Arizona Land Company
    NZ Development Corporation
    NZ Properties, Inc.
Paducah & Illinois Railroad Company
Portal Pipe Line Company
    Portal II Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Burlington Northern Railroad Company ("BN"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 11, 1988.

OPINIONS BELOW

The opinion of the court of appeals is reported at 838 F.2d 1087 and is reproduced in the Appendix ("App.") at 1a to 31a. The opinion of the United States District Court for the District of Montana is reported at 620 F. Supp. 173 and is reproduced in the Appendix at 33a to 35a.

JURISDICTION

The decision of the court of appeals was entered on February 11, 1988. On March 4, 1988, the court of appeals stayed issuance of its mandate pending the filing of this petition for certiorari. App. at 32a. The juris-

diction of this Court is invoked under 28 U.S.C. § 1254 (1) (1982).

STATUTE INVOLVED

Sections 2, 3, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, 153, and 156 (1982), are set forth in the Appendix at 54a to 73a.

STATEMENT OF THE CASE

This case calls into question the ability of rail and air carriers to deal with threats to the public safety by implementing reasonable measures to detect and deter employee drug impairment. After experiencing two major accidents in which drugs or alcohol were found to be a factor, BN initiated a compulsory program of post-accident testing, in which operating employees responsible for "human-factor" accidents—incidents caused by human rather than mechanical error—are tested for drug or alcohol use. Although the post-accident testing program was not prohibited by the collective bargaining agreement, the Ninth Circuit nevertheless enjoined the program on the ground that its implementation violated the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88 (1982). That decision is in direct conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad*, 802 F.2d 1016 (8th Cir. 1986) (App. at 36a-53a), upholding BN's ability to implement precisely the same post-accident testing program at issue here against identical arguments raised by another union.

BN has been a leader in the rail industry in seeking to prevent drug- and alcohol-related accidents. The Ninth Circuit's decision is therefore likely to inhibit, if not preclude, other rail carriers from instituting similar testing programs. Moreover, because the Railway Labor Act applies to air carriers as well as railroads, the issues presented by this case will also directly affect the use of drug testing programs by commercial airlines.

I. RAILWAY LABOR ACT DISPUTE RESOLUTION

Rail and air carrier labor relations are governed by the Railway Labor Act. Under the RLA, the specific procedures for resolving labor disputes depend upon whether the dispute is classified as "major" or "minor." A major dispute is one "relat[ing] to disputes over the formation of collective agreements or efforts to secure them." *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 723 (1944). Minor disputes, on the other hand, involve the interpretation or application of an existing agreement, *id.*, which may include not only express terms but also terms implied by past practice. *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 153-54 (1969). A minor dispute thus

> contemplates the existence of a collective agreement already concluded or, . . . a situation in which no effort is made to bring about a formal change in terms or to create a new one. . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Elgin, Joliet & Eastern Railway, 325 U.S. at 723.

For a major dispute, "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238, 246 (1966). The prescribed steps include advance written notice of the proposed change, voluntary conferences, mediation under the jurisdiction of the National Mediation Board, voluntary binding arbitration, and, finally, formation of an emergency board to investigate and report on the dispute. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969); 45 U.S.C. §§ 155-58, 160 (1982). While this lengthy process is ongoing, neither party may unilaterally alter the "actual, objective work-

ing conditions out of which the dispute arose." *Detroit & Toledo Shore Line Railroad*, 396 U.S. at 153; *see also Jacksonville Terminal Co.*, 394 U.S. at 378.

The procedures for settling minor disputes are much simpler and shorter. *See Elgin, Joliet & Eastern Railway*, 325 U.S. at 727-28. Minor disputes are referred to binding arbitration under the auspices of the National Railroad Adjustment Board ("NRAB"), and may not be the subject of strikes. *Id.* at 726.

In creating the NRAB as "an agency peculiarly competent" to resolve rail employment disputes, Congress "intended to leave a minimum responsibility to the courts." *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566 (1946). A court's responsibility extends solely to determining whether the dispute is minor, and a carrier's burden to satisfy that standard is minimal. Thus, a dispute is minor so long as the parties' interpretations of the agreement are even "arguable," [1] or if the claims are not "frivolous" or "obviously insubstantial." [2] Once this threshold standard is met and the dispute is deemed minor, the court's jurisdiction is ended; only the NRAB is empowered to interpret the agreement and resolve the underlying dispute between the parties.[3]

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[1] *See, e.g., Maine Central Railroad v. United Transportation Union*, 787 F.2d 780, 782 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986); *REA Express Inc. v. Brotherhood of Railway, Airline & Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972); *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

[2] *See, e.g., National Railway Labor Conference v. International Association of Machinists & Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987); *Brotherhood of Railway Carmen v. Norfolk & Western Railway*, 745 F.2d 370, 375 (6th Cir. 1984).

[3] *See, e.g., Maine Central Railroad*, 787 F.2d at 782; *Brotherhood of Railway Carmen v. Pacific Fruit Express Co.*, 651 F.2d 651, 652-53 (9th Cir. 1981); *Piedmont Aviation v. Airline Pilots Association, International*, 416 F.2d 633, 639 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970); *Rutland Railway v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

In contrast to major disputes, in a minor dispute the employer can act consistently with its interpretation of the contract pending the outcome of arbitration. *Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700, 708 (7th Cir. 1987); *International Association of Machinists, District 146 v. Frontier Airlines*, 664 F.2d 538, 542 (5th Cir. 1981).

II. THE BN DRUG DETECTION PROGRAMS

BN has historically enforced a safety rule—known as "Rule G"—that prohibits the use or possession of intoxicating substances by BN employees. In its present form, Rule G provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.[4]

Rule G governs employees represented by all of the sixteen unions recognized by BN. Those unions, including respondent, the Brotherhood of Locomotive Engineers ("BLE"), concede that enforcement of Rule G is necessary to employee and public safety.[5] In fact, prior to this litigation BLE had never challenged Rule G or the means used to detect Rule G violations.

Rule G, which dates from the early 19th century,[6] is in effect on all of the Nation's railroads. The initial ver-

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[4] Joint Stipulation of Facts (filed March 7, 1985) at ¶ 3 (hereinafter "Joint Stipulation"), App. at 74a-75a.

[5] Transcript of district court hearing held March 21, 1985 at 53 (hereinafter "Tr.").

[6] *See* Baltimore & Ohio Railroad Company, 4th Annual Report (1830) (setting forth prohibition against use of "Ardent Spirits"). Rule G has been amended by the industry several times over

sion of the Rule prohibited the use or possession of alcohol by rail employees while on duty or on company property, as well as reporting for duty under the influence of alcohol. Because the Rule was originally directed to alcohol abuse, sensory perception was a reasonably adequate means of identifying most violations. BN consequently instructed supervisory personnel to observe employees' gait and speech and to note such characteristics as bloodshot eyes and the smell of alcohol on the breath.

By the 1970's, drug abuse had become more common among rail employees, and it joined alcohol as a major threat to rail safety. Tr. at 74. In an effort to deter drug use and prevent drug-related accidents, BN took two steps. In 1978, recognizing that sensory perception adequate to detect alcohol use is ineffective with respect to drugs,[7] BN instituted a program of requiring urine, blood, and breath testing following major human-factor accidents.[8] In addition, BN rewrote Rule G to make explicit the prohibition against use of "marijuana or other controlled substances." From January 1981 through March 1984, approximately 100 BN employees were subjected to discipline as a result of post-accident drug tests, including thirteen locomotive engineers.[9]

Although BLE filed "hundreds" of grievances involving individual employees against whom Rule G had been enforced, it registered no general objection to these testing practices and never challenged BN's right to enforce the modified version of Rule G. Tr. at 86. In particular, BLE never invoked the RLA procedures for requiring negotiation on the issue. *Id.* at 50, 63.

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the years to modernize its language and to make clear that it reaches drugs as well as alcohol.

[7] Tr. at 73-74. Indeed, BLE officers have conceded the inability of supervisors to determine employee drug impairment on the basis of visual observation. *Id.* at 52.

[8] Affidavit of Charles J. Bryan, App. at 83a; Tr. at 82.

[9] App. at 83a. Numerous other BN employees were tested following accidents and showed no evidence of drug or alcohol use. *Id.*

BN's institution of employee testing following major accidents unfortunately did not stem the growing problem of employee substance abuse. On April 15, 1984, two BN trains collided near Wiggins, Colorado, killing five employees and causing $2 million in property damage. The National Transportation Safety Board ("NTSB") found that alcohol use by an engineer was a possible cause of that accident. Only six days later, an engineer and a head brakeman operating a train near Newcastle, Wyoming disobeyed a slow signal and an absolute stop signal and crashed into a standing train. Two BN employees died and property damage totalling $1 million resulted. The NTSB determined that use of marijuana was implicated in that accident.[10] Concerned that even its major accident testing procedures had failed to prevent these serious accidents—and aware that their consequences could have been even more serious had Amtrak trains or hazardous cargoes been involved—BN took immediate steps to strengthen Rule G enforcement.[11]

The intensified testing program that BN implemented in November 1984 requires compulsory urinalysis in three instances: (1) when a BN supervisory official determines that an employee is displaying abnormal behavior; (2) when a major human-factor accident occurs; and (3) when a minor human-factor accident occurs.[12] However,

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[10] *Abuse of Drugs, Alcohol Seen as Factors in Train Wrecks,* Washington Post, April 26, 1984, at A1.

[11] One of those steps was expanded use of canine inspection teams, which had previously been used to detect drugs in regions with high numbers of accidents or safety rule violations. Tr. at 76. In separate litigation, also initiated by BLE, the Ninth Circuit enjoined BN's canine inspection program. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad,* 838 F.2d 1102 (9th Cir. 1988).

[12] Major human-factor accidents include "major collisions involving more than one train or one switching movement." Memorandum from Charles J. Bryan, App. at 99a. Minor human-factor accidents include "derailments in yard or industry switching, failures to respond to signals, running through switches or derailments, and failures to secure." *Id.*

testing is required only if there is a causal connection between the accident and the employee's responsibilities, and testing is not required if the cause of the accident is limited to factors other than employee error.[13]

This amplified post-accident testing program was implemented in each of the twenty-nine states and two Canadian provinces in which BN operates. During its first four months, the intensified program yielded a decrease of 32 percent in human-factor accidents and 55 percent in accident-related expenses.[14]

Although the BLE General Chairman voiced objections to BN officials with respect to the intensified drug detection program, BLE did not demand collective bargaining on it.[15] BN engaged in informal discussion of the issue in an effort to allay BLE's concerns, offering to cooperate with the union in resolving any individual problems in the program's application or, if necessary, to submit the program to expedited arbitration.[16] When BLE refused to continue the informal discussion process, BN submitted the issue for binding arbitration as a "minor dispute" under the RLA.[17] That arbitration, which was filed by

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[13] Joint Stipulation at ¶ 20, App. at 77a-78a. The intensified post-accident testing program is designed to permit investigation only when supervisory personnel have a reasonable suspicion that an employee is impaired by drug or alcohol use. Testing is limited to the crew directly responsible for the accident, or to the responsible individual within the crew, and the tests are conducted at medical facilities under the least intrusive circumstances possible. App. at 99a. BLE has raised no issue in this case as to the manner in which the tests are conducted or the acceptability of test results.

[14] Of the 329 BN employees designated for testing during that period, nearly twenty percent either tested positive or refused to be tested. App. at 83a.

[15] Affidavit of James B. Dagnon, App. at 94a-95a.

[16] *Id.*; Joint Stipulation at ¶ 19, App. at 77a.

[17] App. at 96a; Joint Stipulation at ¶ 28, App. at 79a-80a. The arbitrators thus would have jurisdiction to decide the merits of the issue, including whether BN could impose the drug testing program

BN on February 6, 1985, is pending before an NRAB arbitration panel.

After the arbitration was filed, this same post-accident testing program was challenged by the Brotherhood of Maintenance of Way Employees.[18] Like the BLE here, that union contended that BN's institution of the amplified post-accident testing program created a major dispute. 642 F. Supp. at 43. The district court rejected the union's claim, holding that

> the testing challenged by the Union is "arguably justified" under the terms of the agreement now existing between the parties. Furthermore, the Court finds that the implied contractual agreement between the parties, as it relates to the enforcement of Rule G, is "reasonably susceptible" to the interpretations sought by both the carrier and the union. As a result, the Court finds the present controversy of post-incident testing to be a "minor" dispute within the meaning of the RLA.

Id. at 47 (footnote omitted).

The Eighth Circuit affirmed, holding that a dispute must be classified as minor if the agreement is "reasonably susceptible" of the interpretations sought by both the employer and the employees and that the record clearly sustained the trial court's finding that BN's in-

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unilaterally as a matter of management prerogative. *See, e.g., United Transportation Union v. Richmond, Fredericksburg & Potomac Railroad*, Pub. L. Board No. 1775 (1976); *compare California Cedar Products Co.*, 123 L.R.R.M. 1355 (1986).

[18] *See Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad*, 642 F. Supp. 41 (N.D. Iowa 1985), *aff'd in part and rev'd in part*, 802 F.2d 1016 (8th Cir. 1986). The union in that case also challenged BN's incorporation of drug testing into its longstanding requirement that job applicants and employees returning to work after furlough undergo physical examinations, including urinalysis, and that employees have periodic physical examinations. The Eighth Circuit also held that these issues constituted minor disputes. 802 F.2d at 1024, App. at 51a-52a.

terpretation of the agreement was plausible. 802 F.2d at 1022, App. at 47a. It emphasized that the union had acquiesced in BN's imposition of Rule G and enforcement of the Rule through sensory perception, and that "[w]hat the railroad has done now is to add a more refined step, the urine test, to confirm the observation of the supervisor." 802 F.2d at 1023, App. at 50a. The Eighth Circuit therefore refused to enjoin the program.

III. THE DECISIONS OF THE COURTS BELOW

Despite the pendency of the arbitration at the NRAB, BLE filed this action, seeking a declaration that BN's implementation of the post-accident drug testing program violated the Railway Labor Act and "the rights of its employees represented by BLE to privacy and against unreasonable searches and seizures." Complaint at ¶ A (filed Feb. 20, 1985). BLE also requested injunctive relief. Complaint at ¶ C. Although BLE had never challenged Rule G or any detection method, including urinalysis following major human-factor accidents, the union claimed that BN had no right under the collective bargaining agreement to use urinalysis tests to detect drug-related Rule G violations in cases of minor human factor accidents or safety rule violations.

BN sought dismissal of the complaint on the ground that the NRAB had exclusive jurisdiction over the dispute. After submission of affidavits and an evidentiary hearing at which witnesses for both BLE and BN testified, the district court granted summary judgment to BN. App. at 35a.

The district court squarely rejected BLE's claim that implementation of the post-accident drug testing program constituted a major dispute as to which BN was compelled to negotiate. The court held that the parties had implicitly agreed that BN could investigate violations of Rule G:

> The critical term of that agreement . . . is the term requiring the existence of a modicum of evidence that

> a particular employee was operating under the influence of a prohibited substance, before a supervisor would conduct further investigation. . . . BN subjects an employee to urinalysis when that employee is believed to have been involved in an operating rule violation. . . . [B]ased upon the pleadings and evidence of record in this matter, the court concludes the urinalysis practice challenged by the Brotherhood is "arguably justified" under the terms of the agreement extant between the Brotherhood and the BN. Consequently, the court finds the present controversy to be a "minor" dispute within the meaning of the RLA.

Id.

In a divided opinion, the Ninth Circuit reversed the district court and remanded for issuance of a permanent injunction prohibiting testing of BLE members. The majority acknowledged that the district court had "accurately summarized" the standard for distinguishing between major and minor disputes as "whether the railroad's actions are 'arguably justified' by the collective agreement between BN and the BLE." *Id.* at 8a (emphasis deleted). It also acknowledged that it was bound by the district court's factual findings unless they were clearly erroneous, and agreed that BN's enforcement of Rule G "does not fall within the scope of any *express* provision of the collective agreement." *Id.* at 4a, 9a.

However, the Ninth Circuit majority rejected the trial court's findings as to the parties' past practices and the implied terms of the agreement. Without citing any evidence of record, it found there had been acquiescence only in techniques for enforcement of Rule G that were "nonintrusive," involving no greater interference with employee privacy than that caused by sensory perception of drug and alcohol impairment. *Id.* at 11a-12a. The majority reached this finding "by reference to fourth amendment doctrine," holding that BLE would not have "implicitly granted BN the authority to invade [its members'] privacy in ways the government could not" under

the Fourth Amendment.[19] The Ninth Circuit consequently ruled that BN's interpretation of the agreement was not arguably justified by any implied term of the collective bargaining agreement and that the dispute was therefore major.

The dissenting member of the Ninth Circuit panel concluded that the majority's decision was "critically flawed" because of its failure to apply correctly the "arguably justified" standard used by the district court and acknowledged by the majority to be the proper test. *Id.* at 13a. The dissent noted that

> [i]nstead of determining whether post-incident testing is arguably permitted by Rule G, the majority abandons the proper test and applies the Fourth Amendment to an agreement between non-governmental actors. . . .
>
> * * * *
>
> The majority's new test would make the intention of the parties irrelevant to a proper interpretation of their agreement.

Id. at 13a-14a.

After applying the "arguably justified" standard to the findings of the district court, the dissent concluded that the case presented a minor dispute, and observed that "[m]y conclusion that post-incident testing poses only a minor dispute is supported by the Eighth Circuit's recent decision in *Brotherhood of Maintenance of Way Employees*." *Id.* at 29a. The dissent was critical of the majority's failure to follow

> the Eighth Circuit's well-reasoned analysis of precisely the same issue . . . . [T]he only difference between the question presented in this matter and the

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[19] App. at 11a. The same Ninth Circuit majority ruled the same day that mandatory drug testing pursuant to regulations adopted by the Federal Railroad Administration involved an unreasonable search prohibited by the Fourth Amendment. *See Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988).

> issue before the Eighth Circuit is the identity of the union challenging the testing program. In all other respects the facts and legal questions are identical. The majority's opinion creates an intercircuit conflict.

Id. at 13a (citation omitted).

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE AN INTERCIRCUIT CONFLICT ON AN ISSUE OF CRITICAL IMPORTANCE TO RAIL AND AIRLINE SAFETY

A. The Circuits Are in Conflict as to Whether the Implementation of More Effective Measures to Detect Drug Impairment Creates a Major Dispute

Increased concern over the safety threat caused by substance abuse has led rail and air carriers to turn to more effective measures to enforce their historic rules against alcohol and drug use by employees. But the question whether such measures can be implemented without precipitating a major dispute under the RLA has split the federal courts. The conflict is demonstrated most graphically by the contrast between the decision of the Ninth Circuit in this case, which enjoined BN's post-accident testing program, and that of the Eighth Circuit in *Brotherhood of Maintenance of Way Employees*, which upheld BN's implementation of the *same* post-accident testing program based on the *same* evidence regarding past practices.

The contrast between the reasoning of the Eighth Circuit and that of the Ninth Circuit is stark. After reviewing the evidence of the parties' past practices with respect to Rule G violations, the Eighth Circuit concluded that:

> [w]hat the railroad has done now is to add a more refined step, the urine test, to confirm the observation of the supervisor. Since the test can be required only upon some showing that the employee may be

> impaired, the ground rules between the union and the railroad have not changed significantly; suspicion of impairment is still required.

802 F.2d at 1023, App. at 50a. The Ninth Circuit, however, viewed the post-accident testing program as a marked disruption of those same ground rules:

> BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the nonintrusive procedure of sensory surveillance.

App. at 11a-12a.

These irreconcilable appellate precedents will exacerbate the already substantial confusion among district courts on these issues. For example, a district court in the Third Circuit has recently enjoined a random drug-testing program with respect to Southeastern Pennsylvania Transportation Authority employees subject to the Railway Labor Act. Like the Ninth Circuit here, the district court reasoned that objections to that program raised a major dispute even though employees had previously acquiesced in other efforts to identify drug impairment. *Transportation Workers Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 127 L.R.R.M. 2835 (E.D. Pa. 1988), *appeal docketed*, No. 88-1117 (3d Cir. Feb. 18, 1988).[20]

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[20] *See also International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Southwest Airlines*, No. CA3-86-3103-R (N.D. Tex. Jan. 9, 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) (App. at 121a). In that case, the union challenged as a "major dispute" a program to test employees for drugs after they were involved in vehicle or aircraft accidents. Finding that Southwest Airlines had no past practice of drug abuse investigation, the court held the dispute to be major and enjoined the program. App. at 121a, 128a. In its opinion, the court distinguished the rationale of both the Eighth Circuit's decision in

In contrast, two other district courts have refused to enjoin drug testing by airlines, rejecting union claims that a major RLA dispute was involved. In *International Association of Machinists & Aerospace Workers v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987), the court relied on the Eighth Circuit's decision in dismissing challenges to enforcement of a safety rule—nearly identical in terms to Rule G—that had been implemented by the entire airline industry and that TWA previously had enforced by means of sensory perception. *Id.* at 232. The court described the progression from sensory perception to an objective testing policy as a mere "refinement of the techniques used in the past," and held that the airline's claimed contractual justification for the change was not "obviously insubstantial." *Id.* The dispute accordingly was held to be minor and TWA was permitted to implement the drug testing program pending arbitration.[21]

Similarly, in *Airline Pilots Association International v. Alaska Airlines*, No. C87-353R (W.D. Wa. Aug. 11, 1987), *appeal docketed*, No. 87-4167 (9th Cir. Sept. 9, 1987) (App. at 112a), the court refused to enjoin the airline's effort to test pilots returning to work after a

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Brotherhood of Maintenance of Way Employees and the district court's decision in this case on the ground that evidence of a past practice of investigating drug abuse violations existed in those cases. *Id.* at 129a.

[21] Another district court also has held that use of more sophisticated means of detecting alcohol impairment creates a minor dispute. *See International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co.*, 105 L.R.R.M. 2046 (E.D. Cal. 1980). In that case the railroad, which had historically enforced Rule G by means of sensory perception, instituted random use of an "Intoxilyzer" breath analysis device to measure the concentration of alcohol in employees' blood. The court held that because the carrier's enhancement of the techniques used to detect Rule G violations was arguably authorized by the implied terms of the collective bargaining agreement, the dispute was minor. *Id.* at 2049-50.

furlough or when on-the-job behavior revealed a drug problem. Rejecting the pilots' claim that the testing program created a major dispute, the court noted that safety rules long had banned the use of drugs and alcohol by pilots as well as imposing a routine physical examination requirement. The pilots had acquiesced in these past practices regarding on-duty drug use, and the dispute was therefore minor. *Id.* at 118a.

Neither the railroads nor the public can long endure this situation, in which different safety standards are applicable in different circuits or judicial districts. All of the Nation's major railroads operate in more than one state; the twenty-nine states in which BN operates encompass seven of the federal circuits. The techniques for enforcing Rule G cannot change as trains run across the country from one state to another. This is precisely why, in enacting virtually every major piece of federal railroad legislation, Congress has emphasized the need for nationwide geographic uniformity in the handling of railroad employment issues. *See, e.g.*, 49 U.S.C. § 10101a (Staggers Rail Act of 1980); 45 U.S.C. §§ 51 *et seq.* (Federal Employers' Liability Act); 45 U.S.C. §§ 421, 431 *et seq.* (Federal Railroad Safety Act). The conflict created by the Ninth Circuit decision makes such uniformity impossible.[22]

The conflict also has the potential for creating serious practical problems in employee relations. BN's employees are represented by sixteen separate unions. Members of different unions frequently work together on the same train or on the same project. Indeed, the locomotive

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[22] The confusion engendered by such conflicting decisions also will affect the arbitrations over drug testing issues that frequently occur throughout the country. *See* Denenberg & Denenberg, *Drug Testing from the Arbitrator's Perspective*, 11 Nova L.J. 371 (1987). In resolving the merits of drug testing controversies, arbitrators will be forced to align themselves with the Eighth Circuit, the Ninth Circuit, a local district court, or, perhaps most likely, delay reaching a decision until definitive legal guidance is obtained.

crew almost always consists of a BLE member—the engineer—and one or more members of another union—a conductor, a brakeman, or a fireman. When an accident occurs BN will be able to test employees who are members of other unions, but—as a result of the conflicting decisions of the Eighth and Ninth Circuits—will be prohibited from testing any BLE members. Such a situation could well lead to the perception that the drug testing program is unfairly administered or designed to penalize a few, rather than implemented for the protection of all.

Finally, the inconsistent case law results in a set of rules that together make no sense. For example, under the current state of the law, a railroad can require *all* of its employees to undergo a urinalysis drug screen as part of a routine annual physical examination without initiating a major dispute,[23] but it cannot require such testing of BLE employees involved in a human factor accident in which people are killed, App. at 11a-12a.

This Court must act promptly to reverse the decision below and resolve the intercircuit conflict. The Ninth Circuit's decision is likely to cripple BN's efforts to protect the public against undeniably serious risks. The decision will have similar implications for other railroads and air carriers that do not have express provisions governing drug testing in their collective bargaining agreements. There is no reason to think that decisions by additional circuits will clarify the issue, although they undoubtedly will further complicate administration of any drug testing program. Given the urgency of the threat to public safety posed by employee drug use in railroad and airline operations, the question should be resolved by the Court at this time.

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[23] *See Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700, 706 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1024, App. at 51a-52a.

B. The Decision Below Threatens the Public Safety and Undermines the Pro-Arbitration Policy of the Railway Labor Act

The issue on which the Ninth and Eighth Circuits are in conflict is one of major national importance. Since January 1987 alone, there have been 41 railroad accidents in which one or more of the employees responsible for operating the train were impaired by drugs or alcohol.[24] Those accidents caused 29 deaths and more than 340 injuries, as well as over $28 million in property damage.[25]

The risks to the public from drug-impaired railroad employees propelling 150-ton locomotives over congested rail corridors have become painfully evident in recent months. Apart from the obvious threat to the health and safety of rail employees, collisions with Amtrak passenger trains[26] and derailments of trains carrying hazardous chemicals or radioactive materials[27] pose grave

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[24] *See* Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Comm. on Commerce, Science and Transportation, 100th Cong., 2d Sess. at 50-51 (1988) ("Amtrak Crash Hearings") (statement of John H. Riley, Administrator, Federal Railroad Administration).

[25] *Id.* According to the Federal Railroad Administration, even these dramatic statistics are understated: "Many additional train accidents, fatalities in train incidents, and injuries in train incidents are caused by alcohol or drug impairment, but the role of alcohol or drugs escapes detection or is inadequately documented or reported." 50 Fed. Reg 31,508, 31,515-16 (1985).

[26] *See* Washington Post, Jan. 15, 1987, at A1 (engineer and brakeman involved in January 4, 1987, fatal collision of Conrail locomotive and Amtrak passenger train impaired by use of marijuana); *see also* Amtrak Crash Hearings at 82-83 (statement of Ricky L. Gates).

[27] Derailments of trains carrying hazardous chemicals can require the evacuation of thousands from their homes. *See, e.g.*, United Press Int'l, Mar. 20, 1988 (1700 persons evacuated from Annandale, Minn.); Associated Press, Dec. 13, 1987 (5000 persons evacuated from Round Rock, Tex.); Associated Press, July 22, 1987 (16,000 persons evacuated from Pittsburgh, Pa.); Associated Press,

dangers to the general public.[28]

The Ninth Circuit majority's conclusion that BN's drug testing program is subject to the major dispute procedures of the RLA means, as a practical matter, that implementation of the program will be delayed indefinitely. This result and its implications for the safety of rail and airline operations should not be lightly accepted.

The Ninth Circuit wholly failed to appreciate the context in which railroad operations are conducted and the role of safety in the railroad work environment. Railroads, unlike most private businesses, cannot limit their undertaking and are not free to avoid handling commodities—such as hazardous chemicals and radioactive materials—that present major public safety hazards.[29] Nor are they able to keep dangerous commodities away from populated areas, since they are physically confined to track systems that often traverse urban areas. The inherently dangerous nature of railroad operations is

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May 6, 1987 (1000 persons evacuated from Confluence, Pa.); United Press Int'l, Feb. 2, 1987 (200 persons evacuated from Corinth, Miss.); United Press Int'l, Jan. 6, 1987 (derailment in Callicoon, N.Y., forced evacuation of hospital and "scores of residents").

[28] Employee drug abuse has also endangered airline passengers. *See, e.g.*, N.Y. Times, Mar. 12, 1988, § 1 at 6, Col. 1 (traces of cocaine found in pilot of Continental Express commuter plane that crashed near Durango, Colorado, killing nine); L.A. Times, Nov. 15, 1987, § 1 at 22, Col. 1 (captain of jet that crashed at Dallas-Fort Worth International Airport, killing 137, had tranquilizer prescriptions filled several times in months before crash); *see also* 53 Fed. Reg. 8368, 8369 (1988) (information on drug abuse by pilots given as background to proposed Federal Aviation Administration regulations regarding drug testing); L.A. Times, Sept. 9, 1987, § 1 at 2, Col. 5 (small plane pilot arrested on suspicion of drunk flying after making several erratic approaches to airport).

[29] *See Akron, Canton & Youngstown Railroad v. ICC*, 611 F.2d 1162, 1167-68 (6th Cir. 1979) (common carrier obligation to handle spent nuclear fuel and low-level reactor wastes), *cert. denied*, 449 U.S. 830 (1980); *see also Consolidated Rail Corp. v. ICC*, 646 F.2d 642, 644 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981).

reflected in the array of statutes, regulations, and common law principles directed toward mandating that railroads operate in the safest possible manner.[30] It is also reflected in the detailed safety rules—including Rule G—that govern railroad employees.

In this context, it was particularly inappropriate for the Ninth Circuit to construe the parties' agreement as *precluding* the implementation of needed safety measures, such as BN's post-accident drug testing program, in the absence of express terms to that effect. If anything, the presumption should be that the parties entered into an agreement consistent with the public safety, implicitly authorizing the carrier to employ reasonable measures to detect and deter violations of previously-imposed safety rules.

Such a result was clearly supported by the record in this case. It is undisputed that Rule G expressly prohibits BN's employees from using or possessing drugs or alcohol on duty and from reporting for work in a state of drug or alcohol impairment. *See supra* at 5. It is equally undisputed that BN's collective bargaining agreement contains no express terms regarding the means of detecting drug use prohibited by the Rule. App. at 9a. Nor did the collective bargaining agreement expressly bar BN from adopting reasonable drug detection measures needed to protect the public as well as its employees' safety. Indeed, the district court found that longstanding practice between the parties permitted the railroad to determine the appropriate means of investi-

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[30] *See, e.g.*, Hours of Service Act, 45 U.S.C. § 62(a) (1982) (restricting the number of hours an employee of a common carrier may be on duty); Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421, 431 *et seq.* (1982); Boiler Inspection Act, 45 U.S.C. §§ 22, 23, 28 *et seq.* (1982); Federal Aviation Act of 1958, 49 U.S.C. Appendix § 1302 (1982) (providing that "[t]he assignment and maintenance of safety [is] the highest priority in air commerce"); *id.* at § 1389(c) (safety of air commuter carriers); *id.* at § 1421 (safety regulation of civil aeronautics); Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. Appendix § 2101 *et seq.* (1982).

gating and deterring suspected individual violations of the Rule. *Id.* at 35a. In these circumstances, the Ninth Circuit should have concluded, consistent with public safety concerns, that BN's position was at the very least an arguable interpretation of the contract and referred the case to arbitration as a minor dispute.[31]

Rather than permitting the NRAB to consider evidence of past practice, the Ninth Circuit reviewed that evidence and reached its own interpretation of the agreement, holding that any other interpretation of the contract, including one lending weight to the public interest in safety, was precluded as a matter of law.[32] This approach betrays the Ninth Circuit majority's fundamental misunderstanding of its role under the RLA. By far exceeding the "minimum responsibility" accorded it by the RLA, the court below violated the pro-arbitration policy of that Act, which grants the NRAB exclusive authority to interpret express and implied contract terms and decide the ultimate controversy between the parties. As a result, the dispute between BN and BLE was decided without benefit of the NRAB's expertise in railroad employment relationships and its familiarity with the understandings and practices previously developed in the enforcement of Rule G.

The situation presented here is far from unique. Because drug abuse has only recently emerged as a problem in the American workplace, most railroad and airline collective bargaining agreements do not explicitly

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[31] Nor would such a decision be inconsistent with *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987). In *Misco*, this Court held that, given the particularly strong federal policy in favor of the arbitration process, general "public policy" concerns could not be used to overturn an arbitrator's decision. Here, BN is contending that public policy considerations are a significant factor in determining that an issue *should* be referred to arbitration.

[32] Indeed, BN submits that its implementation of new techniques to detect Rule G violations is a matter of management prerogative. *See* n.17 *supra*.

address the detection of drug impairment. However, other rail and air carriers also have a past practice of attempting to identify employees impaired by intoxicating substances, and reasonably assume they can move forward promptly with more effective techniques under their existing agreements.[33] The opinion below, holding that such an interpretation is not even plausible, stands as a barrier to the prompt implementation of needed drug screening procedures. If these vital measures are not to be put on hold pending the outcome of the lengthy major dispute process mandated by the Railway Labor Act, guidance from this Court is essential.

II. THE NINTH CIRCUIT ERRED IN INVENTING A FEDERAL COMMON LAW PRINCIPLE OF CONTRACT CONSTRUCTION PREMISED ON THE FOURTH AMENDMENT

While the Ninth Circuit majority refused to presume that concern for the public safety was an implied term of every employment agreement, it did rely upon a presumption in holding that the collective bargaining agreement could not implicitly permit post-accident testing. That presumption is that employees would *never* acquiesce in practices that the government could not impose under the Fourth Amendment—that they would never have permitted the carrier "the authority to invade their privacy in ways the government could not." App. at 11a. The court of appeals thus concluded that even when the express terms of the collective bargaining agreement do not create any expectation of privacy, it must be inferred that privacy protections equivalent to those contained in the Fourth Amendment are implicit in the agreement.

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[33] *See, e.g., International Association of Machinists & Aerospace Workers v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987); *Airline Pilots Association International v. Alaska Airlines*, No. C87-353R (W.D. Wa. Aug. 11, 1987) (App. at 112a); *International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co.*, 105 L.R.R.M. 2046 (E.D. Cal. 1980).

The Ninth Circuit holding makes no sense as a matter of law. Its undeniable effect is to make Fourth Amendment constraints indirectly applicable to private employers. However, "[t]his Court has . . . consistently construed [the Fourth Amendment] as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). Indeed, in reviewing employer efforts to deal with workplace drug and alcohol abuse, the lower courts—with the exception of the Ninth Circuit—have carefully distinguished between public employers, whose implementation of drug programs is clearly constrained by the Fourth Amendment, and private employers, whose efforts to develop reasonable and effective programs are not so constrained.[34]

Nor does the Ninth Circuit's freewheeling definition of employee expectations comport with the reality reflected in the record. Urinalysis (including testing for drugs) is a routine feature of pre-employment testing for all BN employees and of the physical examinations required on recall of furloughed employees. BN also requires periodic physicals of all operating employees to assure they remain fit for duty. BLE has never raised any objection to these examinations, which involve precisely the same activities the Ninth Circuit majority

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[34] *See, e.g., Greco v. Halliburton Co.*, 674 F. Supp. 1447, 1451 (D. Wyo. 1987); *Monroe v. Consolidated Freightways, Inc.*, 654 F. Supp. 661, 663 (E.D. Mo. 1987); *see also* Lehr & Middlebrooks, *Work-Place Privacy Issues and Employer Screening Policies*, 11 Empl. Rel. L.J. 407, 408 (1987); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. Pitt. L. Rev. 201, 217 (1986).

viewed as an unimaginable privacy intrusion in enjoining the post-accident testing program.[35]

The Ninth Circuit majority ignored such legal and factual considerations and—without citing either precedent or record support—established a novel principle of federal contract interpretation that would in effect extend Fourth Amendment constraints to all private employers unless their employees expressly agree to the contrary.[36] Moreover, because the court of appeals asserted this principle solely as an abstract matter of law, the Ninth Circuit decision contains no inherent limitations that would restrict application of the principle to this case, to contract relationships governed by the Rail-

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[35] A substantially similar program of including drug screen urinalyses as part of routine medical examinations was reviewed by the Seventh Circuit in *Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700, 706 (7th Cir. 1987). That court concluded that the institution of urinalysis as part of the annual physical presented at most a minor dispute. *Id.* It made no reference to the Fourth Amendment in the course of its decision.

[36] The Ninth Circuit majority also erred in assuming that BN's post-accident testing program would have violated the Fourth Amendment if it had been governmentally imposed. The majority did not provide any separate reasoning with respect to that point, but relied on its decision in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), in which it enjoined Federal Railroad Administration drug-testing regulations. App. at 12a. The Ninth Circuit's decision in *Burnley*, however, is inconsistent with several other decisions that have recognized that safety concerns justify drug testing of transportation personnel by government employers, even where there is some resulting intrusion upon privacy interests. *See, e.g., Jones v. McKenzie*, 833 F.2d 335, 340-41 (D.C. Cir. 1987); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Sanders v. Washington Metropolitan Area Transit Authority*, 652 F. Supp. 765, 768 (D.D.C. 1986).

The Solicitor General has filed a petition for certiorari in No. 87-1555 challenging the Ninth Circuit's interpretation of the Fourth Amendment in *Burnley*. Reversal of *Burnley* would require reconsideration of the Ninth Circuit's rulings on both the implied in law issue (App. at 12a) and the implied in fact issue (App. at 9a-12a) presented by this petition.

way Labor Act, or even to collectively-bargained employment relationships generally.

The principle on which the Ninth Circuit relied—that absent an express agreement an employee will never be deemed to have agreed to any employer procedure that the Fourth Amendment would bar the government from imposing—has no warrant in the Constitution, the common law, or the Railway Labor Act. It does, however, have broad implications for American industry. Under the reasoning of the Ninth Circuit majority, the Fourth Amendment would in effect become an implied term of every collectively-bargained agreement and perhaps other forms of employment agreements as well.[37] This expansive new federal contract law rule would preclude employers from moving quickly to institute measures to deal with drug use in the workplace. The Ninth Circuit's unsupported invention of this far-reaching principle requires correction by this Court.

III. THE DISTINCTIVE ISSUES POSED BY PRIVATE SECTOR DRUG TESTING PROGRAMS MERIT INDEPENDENT REVIEW BY THIS COURT

The abuse of drugs and alcohol in the workplace has created a need for prompt and effective responses at every level of society. As both government authorities and private employers seek to develop programs that will address the safety hazards caused by drug and alcohol impaired workers, the courts are increasingly being called upon to

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[37] This holding of the Ninth Circuit could have broad consequences for the growing number of lawsuits in which employees have alleged that private employer drug testing violates common law privacy rights. *See, e.g., Association of Western Pulp & Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986); *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985); *Texas Employment Commission v. Hughes Drilling Fluids*, 45 Empl. Prac. Dec. (CCH) ¶ 37,751 (Tex. Ct. App. 1988); *see also* Cross & Haney, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 Ind. L. Rev. 517, 521-22 (1987); Comment, *Jar Wars: Drug Testing in the Workplace*, 23 Willamette L. Rev. 529, 581-82 (1987).

consider how these initiatives can be accommodated within existing structures of public and private relationships.

The legal issues generated by this process are evident on this Court's own docket. The Court has granted a petition for certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879), which deals with Fourth Amendment questions posed by the United States Customs Service's drug-testing program for employees who seek promotion into certain sensitive positions. In addition, the Solicitor General has recently asked the Court to review related Fourth Amendment issues presented by the Federal Railroad Administration's drug-testing regulations in *Burnley*. The search and seizure questions on which those cases turn are undeniably important in determining how government authorities will be able to employ drug and alcohol testing. But this case raises testing issues in a distinct context that is of equal—if not greater—practical importance: the ability of private employers to deal with substance abuse in the workplace.

Employee drug use is an immediate and unavoidable concern in private industry. Private sector employers now must deal on a daily basis with drug and alcohol impaired employees, and of necessity are developing tools to protect their employees, the public, and their businesses from the consequences of drug and alcohol abuse.

The urgency of these problems and the flexible responses they require have made it impossible for private employers to rely solely upon government-sponsored programs such as those at issue in *Von Raab* and *Burnley*. The government's ability to respond is, given the procedures for rule-promulgation, necessarily slow. Private industry by contrast has the capacity to respond promptly. More important, private employers have knowledge of their own workforces and workplaces that permits them to tailor solutions to specific problems. They also have

every incentive to increase the effectiveness of their programs as new and superior technologies become available.

The program at issue in this case well illustrates these points. BN instituted drug testing in 1978 in direct response to confirmed drug use problems among its employees. When several major accidents indicated that employee drug abuse was becoming even more serious, BN was able to respond in 1984 with an amplified program crafted to address the specific problems it faced. The government, by contrast, did not even propose a drug detection program for the rail industry until 1983, and two additional years were required to promulgate final regulations. When the government's program was finally adopted, it covered only a fraction of the safety incidents covered by BN's program. *See* App. at 101a-111a. Thus, although government initiatives such as the regulations at issue in *Burnley* offer a valuable backstop to private employer action, the public cannot simply await governmental solutions to this private workplace problem.

Just as government drug-testing programs cannot be expected to address the specific practical problems faced by private employers, the legal issues raised by government programs cannot yield dispositive answers in the private context. The Fourth Amendment questions as to which the Court has granted certiorari in *Von Raab* and on which the Solicitor General has sought review of *Burnley* simply do not speak to the basic issues faced by private employers such as BN.[38] The legal context in which private employer programs must be evaluated lies

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[38] Significantly, in *Von Raab*, the Customs testing program was motivated by crime-related concerns—the pervasiveness and influence of criminal organizations and their threat to the integrity of customs agents. Here, by contrast, the impetus for BN's program was its overriding concern for the public safety—an objective that has implications for a broad class of employers unaffected by the concerns in *Von Raab*.

not on a constitutional plane but rather in the law of the private workplace and its employment relationships—which in the case of the railroad industry is governed by the Railway Labor Act.

For these reasons, neither *Von Raab* nor *Burnley* can provide answers to the legal questions that will govern private sector drug testing. Any decision in those cases will leave unanswered pressing questions concerning not only the reconciliation of rail and air carriers' safety obligations with the mandates of the Railway Labor Act, but also the ability of private employers generally to adopt drug-testing programs.[39]

Those questions will go unanswered even if this Court grants certiorari in *Burnley*. As the Solicitor General has pointed out in proposing that the Court review *Von Raab* and *Burnley* in tandem, those two cases "present the same ultimate legal question—whether the Fourth Amendment requires a showing of particularized suspicion before the government may engage in employee alcohol and drug testing." *Burnley* Petition for Certiorari at 14. The distinctions between the two cases go to "differences in the balancing process required to determine whether the programs are 'reasonable' within the meaning of the Fourth Amendment," *id.* at 18, rather than to the fundamentally different labor law questions that lie at the heart of this case. Thus, although this case and *Burnley* both involve the special public safety concerns that attend railroad operations, it is this case that presents the opportunity to address the broad, important issues that arise when such measures are im-

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[39] There are also important differences in the structure of the drug testing program here and in *Von Raab*. *Von Raab* involves blanket testing of all employees seeking promotion to certain positions, regardless whether the employee has shown any indicia of drug or alcohol use. By contrast, under the BN program, employees involved in an accident are tested only if the accident is caused by human error and only if the employees were in a position to contribute to the events that led to the accident. *See supra* at 8.

plemented in the context of the collective bargaining relationship.[40]

In sum, this case raises critical private sector employment issues on which guidance cannot be provided in either *Von Raab* or *Burnley*. The existing intercircuit conflict, the widespread safety problems caused by employee drug use in the private workplace, and, particularly, the grave public safety threat to rail and air transportation, all call for independent review of this case.

CONCLUSION

For each of the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[40] As a practical matter, a decision in this case upholding the ability of the railroads to develop and implement their own drug testing programs would essentially render academic the portion of the FRA regulations at issue in *Burnley* that merely authorizes, but does not mandate, employee drug testing. *See* App. at 107a-11a.

87-1681

No. 87-——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4137

D.C. No. CV 85-55-GF

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff-Appellant,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted: July 8, 1986
Seattle, Washington

OPINION

Filed: Feb. 11, 1988

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

Opinion by Judge Pregerson

PREGERSON, Circuit Judge:

In this appeal, we must decide whether the Railway Labor Act ("RLA") bars Burlington Northern Railroad Company ("BN") from unilaterally implementing a mandatory urine testing program designed to restrict alcohol

and narcotics use by on-duty railroad workers. The program requires the entire operating crew of a train to submit to urinalysis when the train is involved in a "human factor" accident unless "responsibility [for the accident] is clearly identified." When responsibility it [sic] clearly identified, only those responsible for the accident are tested.

Our resolution of this matter hinges on whether the challenge of the Brotherhood of Locomotive Engineers ("BLE") to BN's urine testing program is a major or minor dispute under the RLA. The district court held that it is a minor dispute because it is "arguably justified" under an implied provision of the collective agreement between BN and BLE. We disagree.

FACTS

For at least 40 years, BN, like many railroads, has enforced a unilaterally implemented safety rule, Rule G. Rule G prohibits BN employees from using alcohol or narcotics while on duty, from possessing such substances while on company property, and from reporting for duty in a state of intoxication that may impede their ability to perform their work safely.[1] The collective bargaining agreements between BN and its employees' unions do not expressly or implicitly refer to Rule G.

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[1] Rule G presently states:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

BN unilaterally added the reference to "marijuana, or other controlled substances" in 1980.

Undisputed evidence presented to the district court indicated that, before May 1984, BN relied primarily upon sensory surveillance to enforce Rule G. If an employee's gait, breath, odor, slurred speech, bloodshot eyes, or errant behavior suggested to a supervisor or security officer that the employee was intoxicated, BN suspended the employee pending a formal investigation under established procedures. An employee could avoid suspension by voluntarily submitting to urinalysis.

On April 15, 1984, a train crash in Wiggins, Colorado killed five BN employees and caused $2 million in property damage. The National Transportation Safety Board implicated alcohol abuse by an engineer as a possible cause of the accident. On April 21, a train disobeyed an "absolute stop" signal and crashed into a standing train at Newcastle, Wyoming. Two BN employees died. Property damage totaled $1 million. A toxicology report indicated that three crew members had marijuana traces in their body fluids.

Following these two serious crashes, BN intensified its efforts to enforce Rule G by introducing two new programs. First, BN contracted for trained sniffer dogs to detect narcotics on its premises.[2] Second, it began requiring all crew members involved in a human factor accident or operating rule violation to attend a clinic immediately and submit to urinalysis for the presence of narcotics, unless responsibility for the accident or violation otherwise has been clearly identified. Under the new rule, an employee who refuses to submit to mandatory urinalysis after being involved in a human factor accident or operating rule violation is subject to discipline for insubordination.

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[2] BLE's challenge to BN's sniffer dog program is addressed in our companion case, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, No. 85-4138 ("the sniffer dog case").

BLE strenuously opposed BN's new urine testing program and urged BN to end it. BN refused to negotiate. BLE then balloted its branch chairmen on whether to strike on the urinalysis issue. The majority of respondents voted in favor of a strike. BLE filed suit under the RLA. The district court found that BN's urine testing program was "arguably justified" under the collective agreement as amended by custom and practice, and thus constituted a "minor dispute" under the RLA. *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 173, 175 (D. Mont. 1985). Accordingly, the court concluded that it lacked jurisdiction over the dispute, and granted summary judgment in favor of BN. BLE appeals. We reverse.

STANDARD OF REVIEW

Whether a matter constitutes a mandatory subject of bargaining under the RLA is a question of law which we review de novo. *See Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52-53 (2d Cir. 1976); *cf. NLRB v. Int'l Harvester Co.*, 618 F.2d 85, 87 (9th Cir. 1980).

Whether past conduct constitutes custom and practice sufficient to be incorporated as an implied term in a collective agreement covered by the RLA is a question of fact. *See Missouri Pac. Joint Protective Bd., Bhd. Railway Carmen of the United States and Canada v. Missouri Pac. R.R.*, 730 F.2d 533, 537 (8th Cir. 1984); *cf. Hass v. Darigold Dairy Prods. Co.*, 751 F.2d 1096, 1101 (9th Cir. 1985) (implied terms in collective agreement under NLRA). We accept a district court's determination of questions of fact unless clearly erroneous. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

Whether a dispute constitutes a major dispute or a minor dispute under the RLA is a matter of law which we review de novo. *IAM v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985).

ANALYSIS

BN presents alternative arguments in support of its contention that the district court may not enjoin the mandatory urine testing program. First, BN contends that the enforcement of Rule G is a matter entirely within its managerial prerogative. Alternatively, BN contends that the challenged procedure presents only a minor dispute—over which the district court lacks jurisdiction—because it is arguably justified by implied-in-fact and implied-in-law terms of the collective agreement. We address these arguments in turn.

I. *Management Prerogative*

Neither party disputes that Rule G itself is an implied term of the collective agreement. BN asserts, however, that selection of the *method* used to enforce a safety rule like Rule G is entirely a matter of management prerogative, not subject to collective bargaining under the RLA. Thus, BN contends, its prior enforcement practice cannot be an implied condition of the collective agreement or give rise to a labor dispute within the terms of the RLA.

Under the RLA, certain matters are always subject to collective bargaining; other matters fall within the scope of management prerogative, and are not subject to collective bargaining. The RLA requires railroads "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, *and working conditions.*" 45 U.S.C. § 152 (emphasis added). No court has comprehensively explained the scope of the statutory phrase "working conditions."

In *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52 (2d Cir. 1976), the second circuit upheld an employer's management prerogative to determine whether to cease subcontracting ground work at certain airports because the "primary impact" of the union's proposal did not affect

the working conditions of the union's *present* members. 538 F.2d at 52. In so holding, the court distinguished the facts of the case before it from those presented in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330 (1964), in which "the critical question was whether those who were working were to lose their jobs." 538 F.2d at 52-53.

Thus, the *Japan Air Lines* court set forth a simple and pragmatic approach: The RLA requires parties to bargain over any proposal whose primary impact is the loss—or potential loss—of existing employment or employment-related benefits. We now adopt this approach as the rule of this circuit. Under BN's chemical testing program, a Rule G violation, however discovered, could result in an employee's discharge. Because jobs of present employees are jeopardized, BN's mandatory urine testing program is a mandatory subject of bargaining under the RLA and may not be implemented unilaterally. Thus, BN's management prerogative claim is unfounded.

II. *Major vs. Minor Dispute*

Under the Railway Labor Act, all disputes between railroads and their employees are either "major disputes" or "minor disputes." These two categories are "sharply distinguished." *See Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722, (1945), *aff'd on rehearing*, 327 U.S. 661 (1946); *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1145-46 (9th Cir. 1975) (tracing historical development of RLA).[3]

Major disputes "concern [either] the formation of collective bargaining agreements or efforts to secure new rights and incorporate them into future agreements."

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[3] The terms "major dispute" and "minor dispute" are not found anywhere in the RLA. The Supreme Court in *Elgin* coined the terms as a methodology to be used by courts confronted with disputes arising under the RLA. *See Aloha*, 776 F.2d at 815 n.2.

Aloha, 776 F.2d at 815 (citing *Elgin*, 325 U.S. at 723). Minor disputes involve the interpretation or application of existing collective bargaining agreements. *Elgin*, 325 U.S. at 723; *Aloha*, 776 F.2d at 815.

Generally, *major* disputes are "left for settlement entirely to the processes of noncompulsory adjustment." *Elgin*, 325 U.S. at 723-24. A detailed procedure is provided in 45 U.S.C. §§ 152, 155, 156, 157, and 160 for moving the dispute through intial conference and negotiation, submission to the National Mediation Board, voluntary arbitration, and, possibly, investigation by a special emergency board appointed by the President. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). "No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin*, 325 U.S. at 725. Pending the exhaustion of the RLA's mechanism for resolving a major dispute, the status quo applies. The duty to maintain the status quo may be enforced by obtaining injunctive relief in a federal district court. *See Aloha*, 776 F.2d at 816.

In contrast, *minor* disputes are subject to compulsory and binding arbitration. *See* 45 U.S.C. § 153(first)(i). This task is performed by the National Railroad Adjustment Board or a privately established arbitration panel. *See generally* Seidenberg, *Grievance Adjustment in the Railroad Industry* in *The Railway Labor Act at Fifty* 229-35 (National Mediation Board ed., 1976). The arbitrators have *exclusive* jurisdiction over minor disputes. *See Slocum v. Delaware, Lackawanna & W. R.R.*, 339 U.S. 239, 244-45 (1950). Thus, federal courts have no subject matter jurisdiction over minor disputes. *Aloha*, 776 F.2d at 815. When only a minor dispute is involved, there is no duty to maintain the status quo and judicial review of the arbitration panel's decision is extremely limited. *See Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (per curiam).

The test in our circuit for determining whether a dispute involves only the interpretation or application of an existing agreement (and is therefore minor) or involves the formation of a collective agreement or a unilateral effort to change working conditions (and is therefore major) was established in *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). *See Aloha*, 776 F.2d at 815-16; *O'Donnell*, 551 F.2d at 1146-47; *Southern Pac. Transp. Co. v. United Transp. Union*, 491 F.2d 830, 832 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974). We have reformulated the test several times. *See Switchmen's*, 398 F.2d at 447 (only if the disputed action is "in nowise contemplated or arguably covered by the agreement" does it give rise to a major dispute); *Southern Pac. Transp. Co.*, 491 F.2d at 832-33 (A dispute is minor when a contract provision is "reasonabl[y] susceptible" to a party's interpretation.); *O'Donnell*, 551 F.2d at 1146 ("Is the position of at least one of the parties *arguably* predicated on the terms of an agreement?"); *Aloha*, 776 F.2d at 816 (major dispute concerns issue "neither contemplated nor arguably covered" by collective agreement).

The district court accurately summarized the essence of these various reformulations as *whether the railroad's actions are "arguably justified" by the collective agreement* between BN and the BLE. *See* 620 F. Supp. at 175. If the railroad's actions *are* arguably justified, the dispute is a *minor* dispute; if they are *not* arguably justified, the dispute is a *major* dispute. When in doubt, courts construe disputes as minor. *See O'Donnell*, 551 F.2d at 1146-47 (*Switchmen*'s test "is not a stringent one"); *Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985) (citing cases).

A railroad collective agreement includes not only express terms, but terms implied by past practice and by law. *See Detroit & Toledo Shore Line R.R. v. United*

Transp. Union, 396 U.S. 142, 153 (1969) (the status quo in a major dispute includes employment terms established by past practice); *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d 780, 782-83 (1st Cir.) (railroad's assertion that proposed action comported with past custom and practice was arguably correct and thus dispute was minor), *cert. denied*, 107 S. Ct. 169 (1986); *Railway Labor Executives' Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 430 F.2d 994, 996 (9th Cir. 1970) (parties' failure to include a provision in the agreement may indicate that they were relying on the language of a statute to fill the gap), *cert. denied*, 400 U.S. 1021 (1971).

It is clear that BN's new mandatory urine testing program does not fall within the scope of any *express* provision of the collective agreement. Therefore, in determining whether BN's chemical testing program constitutes a major or a minor dispute, we must decide whether it is "arguably justified" by any *implied* provision of the agreement. If it *is* "arguably justified" by either a term implied by past practice (an "implied-in-fact" term) or a term implied by statute or regulation (an "implied-in-law" term), then the dispute is minor, and the federal courts lack jurisdiction to enjoin the program.

A. *Implied-in-Fact Terms*

As an initial matter, we note that both Rule G and its customary enforcement by sensory surveillance were implied-in-fact terms of the collective agreement between BN and BLE. Several BLE officials with extensive experience regarding BN's operating procedures testified that sensory surveillance by BN's supervisors had been the only regular method of Rule G enforcement for over forty years. BLE had long acquiesced in this practice. BN has never disputed that sensory surveillance by BN's supervisors was the primary means of detecting Rule G violations before 1984.

BN contends that its urine testing program is arguably justified by the past practice of sensory surveillance. In the companion "sniffer dog case," the district court determined that the custom and practice of relying on sensory surveillance to detect Rule G violations arguably justified *any* reasonable enforcement method based on "a modicum of evidence." *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 163, 171 (D. Mont. 1985). In the instant case, the district court concluded that such an implied condition arguably justified BN's mandatory urine testing program because "the use of urinalysis was [not] done on a completely random basis. Rather .... BN subjects an employee to urinalysis when the employee is believed to have been involved in an operating rule violation." *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 173, 175 (D. Mont. 1985). This conclusion ignores the critical differences between the old method and the new method: The old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion.

We do not agree that BLE, by acquiescing in Rule G's enforcement by sensory surveillance, can be said to have agreed to allow BN to implement *any* procedure beyond sensory surveillance so long as the procedure is brought into play by a "modicum of evidence" or an "objective triggering event." The kind of sensory surveillance that BN's supervisors had employed in the past—observing an employee's gait, breath, odor, slurred speech, or blood shot eyes—was non-intrusive. It did not implicate the serious privacy intrusions posed by BN's use of mandatory urine testing. Moreover, the sensory surveillance employed by BN's supervisors in the past required suspicion of individual workers based on their conduct and appearance, whereas the new mandatory urine testing procedure may be imposed on the basis of generalized suspicion encompassing an entire train crew.

Our analysis here is aided by reference to fourth amendment doctrine. BN is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment. However, the focus of our inquiry—both under the fourth amendment and under an implied provision of a collective agreement—is the expectation of privacy of those who will be subject to urine testing. *See O'Connor v. Ortega*, 107 S. Ct. 1492, 1497-99 (1987) (reasonableness of a search under the fourth amendment depends on reasonable expectations of privacy); *Shoreline*, 396 U.S. at 153 (the terms of a collective agreement include "actual, objective working conditions and practices, broadly conceived. . . .").

In *Railway Labor Executives' Association v. Burnley*, No. 85-2891, we struck down federal railway safety regulations requiring a mandatory chemical testing program similar to BN's program at issue here. We concluded in *Burnley* that the fourth amendment requires "a degree of particularized suspicion" of the use of alcohol or a controlled substance before a railroad employee can be subject to mandatory drug testing. This analysis is readily applicable here. A railroad worker has certain expectations regarding whether the government may invade his or her privacy under the fourth amendment. Similarly, a railroad worker has certain expectations regarding whether an employer may engage in a similar invasion of privacy under an implied provision of a collective agreement. These expectations are related: Although the source of the invasion is different, the privacy interest is the same. In the case of urine testing programs, the Constitution draws a line between those programs based on particularized suspicion and those based on generalized suspicion. *Burnley* at ——. The former are permissible; the latter are not. We decline to assume that BLE members implicitly grante' BN the authority to invade their privacy in ways the government could not.

BN's new mandatory urine testing program is a clear change in working conditions governed by the collective

agreement and, thus, by definition, a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance. BN's new procedure requiring mandatory urine testing of all members of a train's crew is not arguably justified by the implied provision in the collective agreement allowing BN to enforce Rule G by voluntary urinalysis based on information from sensory surveillance.

B. *Implied-in-Law Terms*

BN also contends that its new mandatory testing program is justified by an implied-in-law provision of the collective agreement. It argues that federal regulations mandating chemical testing of railroad workers constitute an implied-in-law term of its agreement with BLE.

It is true that Federal Railway Administration regulations mandated a chemical testing program similar to the program imposed unilaterally by BN. *See* 49 C.F.R. §§ 219.201, 219.203, and 219.213. However, we have struck these regulations down on constitutional grounds. *Railway Labor Executives Ass'n v. Burnley*, No. 85-2891. They no longer retain any legal force. No other legislative or administrative pronouncement stands either for or against the challenged program. Therefore, generalized mandatory urine testing is not an implied-in-law condition of the collective agreement, and BLE's resistance to that program constitutes not a minor, but a major dispute.

REVERSED AND REMANDED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent. I would hold that BN's testing practice is arguably permitted under the parties' implied agreement. Therefore, the dispute is minor and should be referred to the National Railway Adjustment Board for resolution.

The majority's opinion is contrary to the Eighth Circuit's well-reasoned analysis of precisely the same issue in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). Indeed, the only difference between the question presented in this matter and the issue before the Eighth Circuit is the identity of the union challenging the testing policy. In all other respects the facts and legal questions are identical. The majority's opinion creates an intercircuit conflict. I would adopt the Eighth Circuit's analysis and affirm the district court.

I cannot join in the majority opinion because I believe that the reasoning process employed by my esteemed colleagues is critically flawed. The majority acknowledges that the test for determining if a particular labor practice raises a major or minor dispute is whether the disputed action is "arguably permitted" by the collective bargaining agreement. Thus, the issue presented in this matter is whether post-incident testing is arguably permitted by Rule G.

After correctly stating the applicable test, the majority proceeds to ignore it. Instead of determining whether post-incident testing is arguably permitted by Rule G, the majority abandons the proper test and applies the Fourth Amendment to an agreement between non-governmental actors. In determining whether the testing policy is arguably permitted by the agreement, the majority first inquires whether the *Government* could undertake the post-incident testing procedures prescribed by BN. The majority then responds to this false issue by arguing that

if such tests were performed by the government they would violate the Fourth Amendment. The majority then concludes that post-incident testing is not encompassed within the collective agreement because it "decline[s] to assume that BLE members implicitly granted BN the authority to invade their privacy in ways the government could not."

The Fourth Amendment has no bearing on the *parties'* understanding of their rights and obligations under the collective bargaining agreement. The majority's new test would make the intention of the parties irrelevant to a proper interpretation of their agreement. The law of this circuit, however, dictates that we focus on the collective bargaining agreement in determining whether post-incident testing is arguably permitted. *Int'l Assoc. of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*, 790 F.2d 727, 815-16 (9th Cir. 1986) (Pregerson, J.), *cert. denied* [sic] U.S. ——, 107 S. Ct. 400. Private parties are free to enter into agreements in the interests of public safety and the welfare of co-workers that permit a limited intrusion into privacy rights. The Fourth Amendment is directed at governmental intrusions into privacy interests. *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984). It has not previously been applied by any court to the conduct of private parties. Furthermore, neither party suggested in its briefs or at oral argument that a Fourth Amendment analysis can be applied to the interpretation of an agreement between a union and a private employer.

The majority has failed to explain why it did not request additional briefing and oral argument concerning this radical departure from fourth amendment analysis and the law of this circuit regarding the interpretation of collective bargaining agreements. The General Orders of this Circuit provide that "[i]f a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it should give con-

sideration to requesting additional briefing before issuing a disposition predicated on the particular point." The United States Court of Appeals for the Ninth Circuit, *General Order* 13 (September, 1987).

I. FACTS AND PROCEDURAL HISTORY

This dispute arises out of BN's change in the procedure used to detect violations of Rule G. Rule G provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property, is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Any on-duty employee found to be in violation of Rule G is subject to suspension or discharge. Rule G has been in effect at BN and in the railroad industry in slightly varying forms for at least 40 years. The parties' collective bargaining agreements are silent as to the methods of implementing Rule G or detecting and enforcing violations thereof.

For many years, BN relied upon sensory observations to detect Rule G violations. Employees were suspected of Rule G violations if BN trainmasters and superintendents observed symptoms of intoxication such as staggering, slurred speech, bloodshot eyes, or alcoholic breath. If a BN officer detected alcohol or drug use by an employee, the worker was asked to take a urine test to clear himself. Under the prior practice, an employee was not requested to submit to a urine test until there was sufficient facts to establish "probable cause" to believe that the employee had violated Rule G. If the employee refused to take the urine test, he was not disciplined for insubordination.

However, an employee could be suspended for violation of Rule G based solely on the presentation of evidence of a visual observation of objective symptoms of intoxication.

In 1984, two accidents occurred on BN trains in which several individuals were fatally injured. The evidence gathered by BN investigators pointed to controlled substance or alcohol impairment by the operating crews. Shortly after these tragic events, BN intensified use of urine testing.[1] On November 5, 1984, Charles J. Bryan, BN's Senior Vice-President of Operations, distributed a memorandum (hereinafter the Bryan Memorandum) to BN officers which "amplifi[ed] and restat[ed] BN's existing policy defining when 'probable cause' exists sufficient to require urinalysis tests to detect possible Rule G violations by BN operating employees." Under the Bryan Memorandum's interpretation of the sweep of Rule G, blood or urine testing became mandatory following an accident or operating rule violation. The Bryan Memorandum directed that "when responsibility is clearly identified," a train's entire operating crew, or separate individuals be sent to a clinic for a urinalysis sample after (1) a "major human factor accident," i.e., a major collision involving more than one train or one switching movement, (2) a "minor human factor accident," i.e., derailments in yard or industry switching, failures to respond to signals, run through switches or derails, and failures to secure, and (3) a BN supervisor detects an employee displaying abnormal behavior. Blood or urine testing is required only following a human-factor accident,

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[1] On April 15, 1984, a train crash in Wiggins, Colorado killed five BN employees and caused $2 million property damage. The National Transportation Safety Board (hereinafter NTSB) implicated alcohol abuse by an engineer as a possible cause of the accident. On April 21, 1984, a train disobeyed an absolute stop signal and crashed into a standing train at Newcastle, Wyoming. Two BN employees died and property damage totalled $1 million. A NTSB toxicology report indicated that three crew members had marijuana traces in their body fluids.

not an equipment-related accident. An employee who refuses to submit to a blood or urine test is subject to discipline for insubordination.

BN also utilized trained dogs to detect the possession of controlled substances (hereinafter sniffer dogs) prohibited by Rule G. The Brotherhood filed a complaint on August 29, 1984, seeking declaratory and injunctive relief challenging the use of sniffer dogs. The district court determined that the dispute regarding the use of sniffer dogs was major and granted a permanent injunction. The issue raised by the random use of sniffer dogs is presented in a companion case filed this same date. *Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R.* (No. 85-4138) (hereinafter the sniffer dog case.)[2]

In December 1984, Robert E. Pelava, the General Chairman for the Brotherhood, notified BN that the Brotherhood objected to the mandatory urine or blood testing practice. BN and the Brotherhood unsuccessfully attempted to resolve the dispute. The Brotherhood then sought to amend its complaint in the sniffer dog case to enjoin the mandatory blood or urine testing. The district court denied the motion to amend the pleading.

On January 7, 1985, BN filed a notice of intent to submit the blood or urine testing issue for arbitration as a "minor" dispute with the Adjustment Board pursuant to 45 U.S.C. § 153, First (i), of the RLA.[3] On

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[2] The district court referred to the sniffer dog case as *BLE I, Bhd. of Locomotive Eng'rs v. Burlington Northern R.R.*, 620 F. Supp. 173, 174 (D. Mont. 1985).

[3] 45 U.S.C. § 153, First (i) provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes

February 6, 1985, BN filed its formal submission to the Adjustment Board.

On February 14, 1985, the Brotherhood filed a complaint in federal district court for declaratory and injunctive relief. The Brotherhood sought (1) an injunction prohibiting BN's mandatory urine and blood testing practice, (2) an injunction prohibiting BN from proceeding with its submission before the Adjustment Board, and (3) a declaration that BN's testing practice violated the parties' collective bargaining agreements. On March 7, 1985, the Brotherhood filed a motion for a preliminary injunction. BN thereafter filed a motion to dismiss the Brotherhood's complaint. BN alleged that the Adjustment Board has exclusive subject matter jurisdiction over the question because it was a "minor" dispute under the Act.

After conducting an evidentiary hearing, the district court treated BN's motion to dismiss as a motion for summary judgment under Fed. R. Civ. P. 12(b)(6).[4] *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 174 n.1, 175. In addition to considering the evidence presented at the hearing on the motion for a preliminary

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may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

[4] Fed. R. Civ. P. 12(b)(6) provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .

injunction and motion to dismiss, the court took judicial notice of the record and facts established in the sniffer dog case. *Id.* at 174.

The district court noted that the collective bargaining agreements between the parties made no reference to Rule G, nor to any specific method of detecting alcohol and controlled substance abuse, or to blood or urine tests. The courts found, however, that the procedure for the detection and investigation of alcohol or controlled substance abuse adopted by the railroad, and acquiesced in by the union, had existed over a substantial period of time and had become an implied provision or condition of the collective bargaining agreement. *Id.* at 175; *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 170. As described above, the procedure employed by the railroad to implement Rule G consisted of sensory observation by a supervisor of objective symptoms of alcohol or substance abuse, such as slurred speech, staggered walk, alcoholic breath, followed by a voluntary blood or urine test, if the employee wished to clear himself of suspicion. The district court held that because the facts alleged in the Brotherhood's complaint and the evidence presented at the hearing demonstrated that BN employees were requested to submit to blood or urine tests when a specific worker was believed to have been involved in an accident or operating rule violation, the challenged mandatory blood or urine testing procedure was "arguably justified" under the term of the "implied agreement extant between the parties." *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 175. The district court held that it lacked subject matter jurisdiction because the dispute was minor. *Id.*

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment *de novo*, in the light most favorable to the nonmoving party, to determine whether there are any genuine issues of material fact and whether the district

court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

III. RESOLUTION OF DISPUTES UNDER THE ACT

The fundamental issue raised in this action is whether BN's implementation of its mandatory urine and blood testing practice to detect Rule G violations, following an accident or an operating rule violation, constitutes a change in working conditions accomplished in violation of the notice, negotiation, and mediation requirements imposed by sections 2 and 6 of the RLA, 45 U.S.C. §§ 152, Seventh, and 156.[5] Resolution of this issue depends on whether the controversy between the Brotherhood and BN is a "major" or "minor" dispute under the Act.[6]

Major disputes involve

> the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

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[5] 45 U.S.C. § 152, Seventh, provides: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

45 U.S.C. § 156 provides in pertinent part:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference . . . .

[6] The RLA does not use the terms "major" and "minor" to distinguish disputes. *Int'l Assoc. of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 n.2 (9th Cir. 1985). The terminology was utilized by the Supreme Court in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 722-28 (1945).

325 U.S. at 723; 790 F.2d at 730 n.1 (9th Cir. 1986). In contrast, minor disputes presuppose the existence of an agreement or "a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin*, 325 U.S. at 723; *Aloha Airlines*, 790 F.2d at 730 n.1. The distinction between major and minor disputes is imprecise and has plagued the courts. *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1146 (9th Cir. 1977).

A. *Major Disputes*

The distinction between major and minor disputes has important consequences regarding the applicable procedures for dispute resolution and the authority of the courts to intervene. *Id.* The railroad must give at least, 30 days notice of a proposed change in the "rates of pay, rules, or working conditions." 45 U.S.C. § 156. A dispute arising from the proposed change is known as a major dispute. *O'Donnell*, 551 F.2d at 1146. The parties are required to confer and "to exert every reasonable effort" to settle disputes. 45 U.S.C. § 152, First.[7] If conference fails, either party may invoke the services of the National Mediation Board. 45 U.S.C. § 155. If

[7] The RLA treats major and minor disputes alike in requiring negotiation as the first step toward settlement. 45 U.S.C. § 152, First, Second. 45 U.S.C. § 152 provides:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . . .
>
> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

mediation fails, the Mediation Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can only take place if both parties consent. 45 U.S.C. §§ 155, First, 157. If arbitration is rejected, the parties are relegated to self-help in adjusting the dispute. *Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R. Co.*, 372 U.S. 284, 291 (1963) (per curiam); *Trans Int'l Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 650 F.2d 949, 960 (9th Cir. 1980), *cert. denied sub. nom., Air Line Pilots Assoc. Int'l v. Trans Int'l Airlines, Inc.*, 449 U.S. 1110 (1981). If the dispute threatens "substantially to interrupt interstate commerce," the President may create an emergency board to investigate and report on the dispute. 45 U.S.C. § 160.

The RLA requires both parties to maintain the status quo of a major dispute during the mediation and conference process. 45 U.S.C. §§ 152, 155, 156, 160; *see Detroit & T. S. L. R.R. v. United Transp. Union*, 396 U.S. 142, 149, n.14 (1969). A district court may enjoin either party from violating the status quo. *See O'Donnell*, 551 F.2d at 1146. The procedures of the RLA to resolve major disputes are purposely long and drawn out in the hope that reason and practical considerations will in time provide an agreement that resolves the dispute. *Brotherhood of Ry. & S.S. Clerks v. Florida E. C. Ry.*, 384 U.S. 238, 246 (1966).

B. *Minor Disputes*

If a railroad takes action arguably permitted under the collective bargaining agreement, *not* entailing a change in rates of pay, rules, and working conditions, a union's opposition based on a differing interpretation of the agreement is considered to be a minor dispute subject to binding adjudication by the Adjustment Board. *O'Donnell*, 551 F.2d at 1146-47. Either party may submit the dispute to the Adjustment Board for decision, provided the party has discharged the initial duty of at-

tempting to resolve the issue through negotiation. 45 U.S.C. § 153, First (i). The Adjustment Board is an administrative tribunal composed of workers and management, 45 U.S.C. § 153, First (a), (h), created to secure the prompt, orderly, and final settlement of minor disputes that arise between employees and railroads regarding rates of pay, rules, and working conditions. *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). The Adjustment Board has exclusive jurisdiction to resolve minor disputes. 45 U.S.C. § 153, First (i); *accord Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 244-45 (1950); *Brotherhood of R.R. Trainmen v. Denver & R. G. W. R.R.*, 290 F.2d 266, 269 (9th Cir.), *cert. denied*, 366 U.S. 966 (1961). The federal courts have no jurisdiction to adjudicate the merits of a minor dispute. *Aloha Airlines*, 776 F.2d at 815.

In establishing the procedures for dispute resolution, Congress considered it essential to keep "minor" disputes within the Adjustment Board and out of the courts. *Sheehan*, 439 U.S. at 94. In *Slocum*, the Supreme Court stated that the Adjustment Board is better suited to resolve minor disputes in the railroad industry involving the application or interpretation of an agreement than federal courts:

> The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems.

339 U.S. at 243 (footnote omitted); *see Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 567 (1946).

A controversy arises, as in the present case, when a union believes a railroad has unilaterally changed working conditions in violation of the bargaining and mediation procedures imposed by 45 U.S.C. §§ 152, Seventh, and 156, thus creating a major dispute, and a railroad believes its challenged action is arguably permitted by the terms of the parties' agreements, and is therefore, subject to resolution only by the Adjustment Board under 45 U.S.C. § 153, First (i), as a minor dispute.

C. *The Test To Determine a Minor Dispute*

As a threshold issue, the Brotherhood contends the use of the "arguably justified" test by the district court to determine if the dispute is major or minor is "questionable." The question whether a district court applied the correct test to determine if a dispute is minor or major under the Act is a question of law which we review *de novo*. *See Aloha Airlines*, 776 F.2d at 815 (the question whether a dispute is major or minor is a "narrow question of law.").

This court has consistently followed the rule in *Switchmen's Union of N. Amer. v. Southern Pacific Co.*, 398 F.2d 443 (9th Cir. 1968) in determining whether a dispute is major or minor. *O'Donnell*, 551 F.2d at 1147. A dispute is minor if the position of at least one of the parties is arguably predicated on the terms of the collective bargaining agreement. *Switchmen's Union*, 398 F.2d at 447; *O'Donnell*, 551 F.2d at 1146. Stated another way, a dispute is minor if the parties' agreement is "reasonably susceptible" to the railroad's interpretation. *Southern Pacific Transp. Co. v. United Transp. Union*, 491 F.2d 830, 833 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974). On the other hand, "if it can be said that the change being imposed by one side on the other is in nowise contemplated or arguably covered by the agreement," the dispute is major. *Switchmen's Union*, 398 F.2d at 447. The test "is not a stringent one in view

of the substantial and long-standing interest in removing labor disputes from the federal courts and placing them in the expert hands of the various arbitration and mediation facilities." *O'Donnel*, 551 F.2d at 1146-47.

In the instant case, the district court posed the issue as follows: "[W]hether the urinalys[i]s practice is 'arguably justified' by the implied agreement, regarding Rule G, found to exist between the Brotherhood and the BN . . . ." *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 175. Thus, the district court applied the appropriate test to determine whether the dispute was major or minor.

IV. THE PARTIES' IMPLIED AGREEMENT

The Brotherhood contends the district court erred in concluding that BN's mandatory blood or urine testing practice is "arguably justified" by the parties' implied agreement regarding the procedure to be followed in the detection of Rule G violations because the testing practice (1) eliminates elements of the parties' implied agreement, (2) creates a new condition of employment, and (3) is completely distinguishable from the company's prior procedure.

A railroad is not limited to the four corners of the collective bargaining agreement to show that a change in a working condition does not constitute a major dispute. *Brotherhood of Locomotive Eng'rs v. Boston & Main Corp.*, 788 F.2d 794, 799 (1st Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 111. This rule is particularly applicable to the railroad industry:

> It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others.

Shore Line, 396 U.S. at 154-55 (footnote omitted). The railroad can rely on "'those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement.'" *Brotherhood of Locomotive Eng'rs v. Boston & Main Corp.*, 788 F.2d at 799 (quoting *Shore Line*, 396 U.S. at 153). Accordingly, past practices and working conditions may become part of the collective bargaining agreement notwithstanding silence in the agreement itself. *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 169; *cf. Switchmen's Union*, 398 F.2d at 447 ("where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, *as illuminated by long-standing practices*, the question of whether the position is well taken involves a minor dispute") (emphasis added). For a past practice to be considered an "actual, objective working condition[ ]," it must have occurred "for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Shore Line*, 396 U.S. at 153, 154; *Brotherhood of Locomotive Eng'rs v. Boston & Maine* [sic] *Corp.*, 788 F.2d at 799.

It is undisputed that the parties' collective bargaining agreements are silent as to the procedure to be followed in detecting and testing for alcohol and substance abuse. The evidence amply demonstrates, however, that the Brotherhood has acquiesced in the procedure followed by BN in the detection and enforcement of Rule G violations for many years. The undisputed evidence established that prior to the Bryan Memorandum, BN relied upon the existence of objective indicators of alcohol or substance abuse as a prerequisite to the investigation of a possible Rule G violation. The triggering event for the investigation of a Rule G violation was the observation that a specific employee's speech was slurred, his gait was staggered, his eyes were bloodshot, or his breath smelled

of alcohol. A worker observed in such a condition was cited for a Rule G violation and advised that a further investigation and a hearing might follow. When viewed in the light most favorable to the Brotherhood, the evidence supports the district court's determination that "the practice of detecting Rule G violations by means of sensory observation . . . has achieved the level of an established practice, deserving of an implied contractual status."

V. THE EXPANDED TESTING PROCEDURE WAS ARGUABLY JUSTIFIED

The next inquiry should be whether the implied agreement—that BN could require further investigation for a Rule G violation after the perception of facts that a specific worker had exhibited symptoms of alcohol or substance abuse—arguably includes the right to conduct blood or urine testing, after an accident or operating rule violation, to confirm or disprove a violation of Rule G. If blood or urine testing following an accident or operation rule violation is arguably included in the implied terms of the collective bargaining agreement, the procedure set forth in the Bryan Memorandum presents a minor dispute.

The Brotherhood contends that the district court erred in granting sumary judgment because material facts are in dispute. The Brotherhood argues that the evidence shows that the mandatory blood or urine testing practice is not "arguably justified" by the parties' implied agreement because prior to the release of the Bryan Memorandum, (1) no employee was subjected to a compulsory body fluid test solely because he was involved in an accident or operation rule violation, (2) agents of BN admitted that the mandatory testing practice was "new," and (3) the testing after the perception of symptoms of alcohol or substance abuse was optional, not mandatory.

Summary judgment is appropriate if the plaintiff cannot prevail as a matter of law when the facts are viewed in his favor. *See Anderson v. Liberty Lobby, Inc.*, —— U.S. ——, 106 S. Ct. 2505, 2510 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted"). Under this court's test to determine if a dispute is minor, the challenged conduct need not exactly mirror the practices which have become an implied provision of the collective bargaining agreement. The challenged conduct need only be *arguably* covered by the parties' implied agreement to be a minor dispute. *Switchmen's Union*, 398 F.2d at 447; *O'Donnell*, 551 F.2d at 1146; *see Southern Pacific Transp. v. United Transp. Union*, 491 F.2d at 833; *accord Brotherhood of Ry. Carmen v. Norfolk & W. Ry. Co.*, 745 F.2d 370, 376-77 (6th Cir. 1984) ("courts are called upon to determine only whether the railroad's contention is arguable, not to determine whether that contention is correct").

While it is true that as a result of the Bryan Memorandum, blood or urine testing became mandatory following an accident or operating rule violation, I agree with the district court that the testing practice nonetheless is arguably permitted under the parties' implied agreement. Both the old and the new procedure involve similar triggering events: the discovery of objective facts suggesting alcohol or substance abuse followed by the use of blood or urine testing to determine if the employee had violated Rule G. Whether mandatory testing is arguably consistent with the prior practice of affording an employee the opportunity to clear himself by a chemical test presents a minor dispute outside the jurisdiction of a federal court. Once a railroad has presented evidence of a past practice that was accepted by the union which, arguably, could support its interpretation of the agreement, the court's inquiry must end; the duty to weigh

and decide who has the better argument is the arbitrator's function. *Maine Cent. R.R. v. United Transp. Union*, 787 F.2d at 782.

The fact that management referred to the blood or urine test procedure as "new" is not controlling. The major-minor dispute dichotomy does not turn on the terminology employed by the parties, but on the substance of the dispute. *Switchmen's Union*, 398 F.2d at 447. It is undisputed that the mandatory blood or urine testing practice following an accident or rule violation was an innovation. I agree with the district court that it is arguable that because the present procedure does not come into play unless there is an objective triggering event which justifies the investigation of a suspected Rule G violation, the urine or blood testing falls within the implied contractual condition of the collective bargaining agreement.

Since there is no genuine issue of material fact that might affect the outcome of the suit, *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2510-2511, the district court correctly concluded that the mandatory urine or blood testing practice presents a minor dispute.

My conclusion that post-incident testing poses only a minor dispute is supported by the Eighth Circuit's recent decision in *Brotherhood of Maintenance of Way Employees*. In that case, BN's maintenance of way workers also sought to enjoin application of BN's post-incident testing policy contending that it presented a major dispute under the RLA.

The district court found that the union had acquiesced in BN's non-random "sensory surveillance" method of enforcing Rule G, and thus that that practice became an implied term of the collective agreement. *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 642 F. Supp. 41, 45 (N.D. Iowa, 1985). It held post-incident testing "arguably" could be seen as

a refinement of the accepted enforcement policy because "post-incident testing . . . [is] not done randomly since it . . . [is] performed after an incident which . . . [gives] rise to the possibility of usage of drugs and/or alcohol." *Id.* at 46-47. Accordingly, the court held that the dispute over post-incident testing was minor and thus it refused to issue the injunction. *Id.* at 47-48.

The Eighth Circuit affirmed the denial of the injunction. Inasmuch as the testing policy was not implemented randomly, it did not constitute "such a serious departure from past practice as to give rise to a major dispute." *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1023.

VI. CONSTITUTIONAL CLAIMS

The Brotherhood finally contends that the district court erred in granting summary judgment because the federal and state constitutional claims in the complaint were not resolved. The Brotherhood suggests that this court should remand the case to the district court for resolution of these claims.

To adjudicate the constitutional issues presented in the Brotherhood's pleading, the district court would have had to reach the merits of the dispute. This minor dispute must be resolved initially by the arbitration procedures set forth under the Act before judicial intervention. The district court lacks subject matter jurisdiction to intervene until the minor dispute is resolved. The district court properly stayed its hand.

VII. MANAGEMENT PREROGATIVE

The BN contends that since no provision of the collective bargaining agreement between the parties restricts the BN with regard to the methods or procedures for detecting violations of Rule G, the method of detection is a matter within BN's managerial preroga-

tive. Therefore, BN reasons, its unilateral implementation of a particular method of detection does not rise to the level of a labor dispute within the Act.

The mere absence of any reference in the collective bargaining agreements to a particular method or detection, standing alone, does not establish that the method which may be utilized to detect violations is a matter within the prerogative of management. The absence of specific language may reflect, as in this case, the fact that particular practices have, through acquiescence, become an implied part of the collective bargaining agreement. *Shore Line*, 396 U.S. at 155.

CONCLUSION

I would affirm the judgment of the district court. I would hold that BN's blood or urine testing practice is a minor dispute arguably permitted by Rule G.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4137

DC CV-85-55-GF

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff-Appellant,
vs.
BURLINGTON NORTHERN RAILROAD COMPANY,
Defendants-Appellees.

ORDER

[Filed Mar. 4, 1988]

Before: PREGERSON, *Circuit Judge*

Appellees' motion for a stay of mandate pending application for a writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

UNITED STATES DISTRICT COURT
D. MONTANA
GREAT FALLS DIVISION

No. CV-85-055-GF

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendants.

July 31, 1985

MEMORANDUM AND ORDER

HATFIELD, District Judge.

The plaintiff, Brotherhood of Locomotive Engineers ("Brotherhood"), instituted the present action for declaratory and injunctive relief, to enjoin the defendant, Burlington Northern Railroad Company ("BN"), from subjecting members of the Brotherhood to urine-testing, designed to curtail the "on-duty" use of alcohol and other intoxicating substances by employees, as forbidden by a safety rule of the BN. The action follows "on the heels" of another action decided today by this court, involving the BN's utilization of dogs trained to detect the presence of drugs or controlled substances in the personal effects of "on-duty" employees. *See, Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 620 F.Supp. 163 (D.Mont.1985) ("BLE I"). Both actions involve the issue of whether the BN's unilateral implementation of the procedures at issue to detect vio-

lations of the BN's safety rules prohibiting the "on-duty" possession or use of intoxicants by its employees violates the pertinent provision of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* The present action is before the court on motion of the BN requesting the court to enter summary judgment in its favor with respect to the claims advanced by the Brotherhood.[1]

The issue which the court must ultimately resolve is whether the BN's unilateral implementation of its mandatory urine-testing policy constitutes a change in working conditions, accomplished in violation of the notice, negotiation and mediation requirements imposed by § 2 in conjunction with § 6 of the RLA, 45 U.S.C. §§ 152 and 156. Restated, the court must decide whether the controversy regarding BN's implementation presents a "major" or "minor" dispute within the meaning of the RLA. *See, Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1944).

In a memorandum entered in *BLE I* on this day, the court set forth its interpretation of the state of the law with respect to (1) the meaning of the term "working condition" as used in the § 2, Seventh and § 3, First (i) of the RLA, 45 U.S.C. §§ 152, Seventh and 153, First (i); and (2) the major-minor dichotomy presented in the RLA. Applying the rationale espoused in *BLE I* to the facts established in this matter, the court finds it appropriate to enter summary judgment at this juncture. In that regard, the court finds it appropriate to take judicial notice of the record in *BLE I*, especially the facts as found to exist by the court in that matter, in resolving the present motion for summary judgment. *See, Union Mechling Corp. v. United States*, 566 F.2d 722 (1977).

The evidence presented in *BLE I* established the terms of the agreement extant between the Brotherhood and the

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[1] Although the BN's motion requested dismissal of the complaint for failure to state a claim, pursuant to Rule 12(b), Fed.R.Civ.P., the court treats the motion as one requesting summary judgment.

BN regarding the means of detecting Rule G violations. The critical term of that agreement, found by the court in *BLE I* to have reached an implied contractual status, is the term requiring the existence of a modicum of evidence that a particular employee was operating under the influence of a prohibited substance, before a supervisor could conduct further investigation. For the identical reasons set forth in *BLE I*, the existence of that term precludes the BN from utilizing urinalyses on a random basis to detect Rule G violations. The BN's random use of urinalyses to detect violations would present a "major" dispute subject to the status quo provisions of 45 U.S.C. § 156. The subjection of an employee to a urinalyses on a random basis is not "arguably" justified by the terms of the implied agreement extant between the parties.

The complaint filed by the Brotherhood does not allege, however, that the use of urinalyses was done on a completely random basis. Rather, the complaint alleges that the BN subjects an employee to urinalysis when that employee is believed to have been involved in an operating rule violation. The question of whether the urinalyses practice is "arguably justified" by the implied agreement, regarding Rule G, found to exist between the Brotherhood and the BN in *BLE I* is not as clear cut as the question was with respect to the random use of drug detection dogs. In fact, based upon the pleadings and evidence of record in this matter, the court concludes the urinalyses practice challenged by the Brotherhood is "arguably justified" under the terms of the agreement extant between the Brotherhood and the BN.

Consequently, the court finds the present controversy to be a "minor" dispute within the meaning of the RLA. The minor nature of the dispute deprives this court of the jurisdiction necessary to grant the injunctive relief sought by the Brotherhood.

For the reasons set forth herein,

IT IS ORDERED that the defendant's motion for summary judgment be, and the same hereby is, GRANTED.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 85-2360, 85-2412

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LODGE 16, *et al.*; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, GRAND LODGE, *et al.*,
Intervenors, Appellants,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellee.

Submitted May 12, 1986

Decided Oct. 1, 1986

Before ARNOLD, FAGG and WOLLMAN, Circuit Judges.

PER CURIAM.

This is a suit in equity for an injunction preventing the defendant, Burlington Northern Railroad Co., from putting into effect unilaterally certain methods for detecting drug use among its employees. In general, if a proposed practice by a rail carrier is a clear departure from the collective-bargaining agreement, a dispute over the practice is treated as a "major dispute" under the Railway Labor Act, and the carrier may not proceed without first negotiating with the employees' representative. But if the proposed practice is arguably justified by the collective-bargaining agreement (including settled past practices of the parties under the agreement), then a dispute is called "minor," and the carrier may proceed unilater-

ally, subject to an arbitration process before the National Railroad Adjustment Board.

This appeal involves two disputed proposed practices. First, the railroad wants to administer chemical drug testing to all employees who appear to be involved in any accident or other incident which seemingly stems from human error. Second, the railroad wants to administer similar tests to all employees who return to work after a furlough or similar absence. The District Court, 642 F.Supp. 41, held that the dispute over the first practice (post-incident testing) was minor. It therefore denied the injunction sought against the railroad's proposed initiation of this practice. But with respect to the second challenged practice (post-furlough testing), the Court held the dispute major and therefore granted the injunction.

Both sides appeal. The union seeks reversal of the denial of the injunction against post-incident testing. The railroad seeks reversal of the grant of the injunction against post-furlough testing.

As to the first issue, we affirm. As to the second, we reverse. The Court's reasons for these holdings are expressed in two opinions. An opinion by Judge Arnold, in which all Members of the Court join, explains our holding that the railroad may proceed with post-incident testing. An opinion by Judge Fagg, in which Judge Wollman joins, explains our holding that the railroad may proceed with post-furlough testing. Judge Arnold dissents from this latter holding.

The judgment of the District Court, insofar as it denied an injunction with respect to post-incident testing, is affirmed. Insofar as it granted an injunction with respect to post-furlough testing, the judgment is reversed, and the injunction is vacated and set aside.

It is so ordered.

ARNOLD, Circuit Judge, for a unanimous Court, concurring in part.

This case involves a dispute between the Burlington Northern Railroad Co. (BN) and the Brotherhood of Maintenance of Way Employees (employees or union) over BN's efforts to deal with drug and alcohol abuse on the job. In response to several serious accidents on the railroad, which were found to have been related to abuse of drugs on the job, BN began a program of mandatory drug testing of employees. Two aspects of this program are before us now: One is "post-incident testing," in which the company requires employees who are involved in accidents or other incidents in which human error could have been a factor to submit to urinalysis in order to determine whether alcohol or certain drugs are in their system. The other testing program involves addition of a drug screen to the standard urinalysis which is part of a required medical examination given to employees periodically and when they return from furlough. The employees take the position that both testing programs amount to major changes in working conditions and therefore should not be implemented without prior negotiation. The District Court [1] agreed with the union as to the drug screen in required medical examinations, and enjoined its use. However, the Court held that the company's program of post-incident testing was at most a minor change in working conditions and therefore denied the injunction sought by the employees against this practice. Both parties have appealed. As already noted, the Court affirms as to post-incident testing and reverses as to the required medical examination on return to work. This opinion gives our reasons for affirming as to post-incident testing.

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[1] The Hon. Donald E. O'Brien, Chief Judge, United States District Court for the Northern District of Iowa.

I.

For a number of years, BN has had among its operating rules a rule (which is uniform throughout the railroad industry) prohibiting employees from using, possessing, or being under the influence of alcohol or other drugs while at work or subject to duty. This rule, known as Rule G, reads as follows:

> The use of alcoholic beverages, intoxicants, and narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on Company property, is prohibited. Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana, or other controlled substance, or medication, including those prescribed by a Doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Designated Record (D.R.) at 217b. The prohibitions of Rule G are also incorporated in BN's safety rules. D.R. at 217a. Any on-duty employee found in violation of these rules is subject to suspension or discharge.

The District Court found that the accepted method of enforcing Rule G in the past had depended primarily on the watchfulness and sensory observation of supervisors. If a supervisor detected abnormal behavior in an employee which led the supervisor to suspect that the employee was working under the influence of alcohol or drugs, then the supervisor would report his suspicion to an officer of the railroad, who would conduct further investigation. In determining that an employee appeared to be under the influence, the supervisor would rely on how the employee walked, talked, or smelled as well as on other physical manifestations of impairment. In recent years the company began to use breathalyzer, blood-alcohol, and urinalysis testing in connection with its enforcement of Rule G. Prior to December 1984, however,

these tests were used only as a means for the employee to clear himself of an accusation that he was working while impaired. The BN policy in effect before that date stated in part:

> Intoxilator, breathalyzer, blood alcohol tests, or urinalysis may not be administered without probable cause. Probable cause exist [sic] only where there is an outward manifestation of intoxication. Examples of such outward manifestations include the odor of alcohol on the breath, slurred or thick speech, apparent loss of coordination, unsteady gait. If such probable cause exists, the employee should be offered the opportunity to submit to intoxilator, breathalyzer, blood testing, and/or urinalysis. Again, before the administration of any such test, the employee must sign a Consent Form. If the employee refuses to submit to such testing after a determination that probable cause exists, he or she should be taken out of service and charged with violation of Rule G.

D.R. at 144-45.

Beginning around December of 1984, BN modified its Rule G enforcement methods. It redefined the events which would trigger the use of chemical tests; it also began to use these tests, particularly urinalysis, as a primary means for establishing the posssibility of drug abuse in employees, whereas in the past the tests had been available as a means for employees to exonerate themselves of a charge of alcohol or drug abuse on the job. The revised policy allowed supervisors to screen employees for drug abuse not only when the employee showed physical manifestations of impairment, but also when the employee was involved in an accident, an on-the-job injury, a rule violation, or an unsafe act. D.R. at 201. When an accident or other incident involved more than one person and responsibility could not be attributed to a particular individual, the entire crew was to be subjected to urinalysis (whether or not any member of the crew showed

signs of intoxication or impairment). D.R. at 68. BN contracted with an outside laboratory for the performance of these urinalyses. Results of the tests were to be returned to the BN medical department. However, when the supervisor requesting the test had immediate need of the results, he was authorized to use local medical facilities which would report the results directly to him. D.R. at 202-03.

Dr. Michael A. Evans, the director of the laboratory hired by BN for urinalysis testing of employees, testified by affidavit and submitted exhibits explaining the purpose, accuracy, and techniques used in drug testing of urine. The primary method used is called the Enzyme Multiplied Immunoassay Technique (EMIT). This test is designed to detect the presence of certain drugs or their metabolites (breakdown products) in a urine sample. The test does not purport to measure intoxication or impairment. D.R. at 193. The EMIT test is highly accurate, producing no more than 5% false positives. The laboratory confirms positive results through use of a gas chromatography/mass spectrometry test (GC/MS), which is considered to be the most accurate available. Although Dr. Evans testified that the EMIT test was calibrated to screen for marijuana at a level above the lowest amount which will produce an effect in a human being (see D.R. at 173), he submitted as an exhibit material describing the EMIT process which indicated that the highly sensitive EMIT test could detect traces of the drug for as long as three weeks after its use and could on occasion produce a positive result in a "passive inhaler" (a person who had been exposed to marijuana smoke through another person smoking in the vicinity). See D.R. at 193. The District Court made no specific findings favoring either Dr. Evans's affidavit or his possibly contradictory exhibit.

These changes in post-incident testing were unilaterally imposed by BN in November of 1984 over the vigorous objections of the employees. They assert that there was

for a number of years a settled, established practice, understood and accepted by both BN and the union, that BN would be entitled to investigate for possible drug or alcohol abuse on the job only when an employee appeared, through observation, to be intoxicated or otherwise impaired. This appearance of impairment alone was sufficient cause to remove the employee from service pending further investigation. The employee could then choose to submit to breath, blood, or urine testing to prove that he was not under the influence. The employees argue that by broadening the definition of sufficient cause to include rule violations and on-the-job injuries, and by including within the suspect group all crew members regardless of whether they appear to be impaired, the railroad has lowered the threshold of suspicion far below the level contemplated by the parties' established past practice. They also object to the mandatory use of urinalysis in the post-incident investigation program. This objection seems to be of two parts: (1) formerly, objective testing was at the opinion of the individual employee if he wished to exonerate himself of a charge of substance abuse; refusal to submit to a test could result in citation for violation of Rule G because the employee had already manifested signs of impairment. Under the present policy, the test is mandatory; refusal to submit to the test is deemed au automatic violation of Rule G regardless of any actual evidence of impairment. (2) The employees strenuously insist that the urinalysis test by itself does not measure impairment; instead, it detects the mere presence of drugs or their end-products in the system, perhaps long after the impairment has worn off. They argue that by using urinalysis as a primary means of detecting possible Rule G violations (rather than as a test to confirm or refute apparent intoxication) the railroad has unilaterally changed the meaning of Rule G itself. Instead of prohibiting impaired performance on the job, it now punishes past exposure to drugs even if there is no effect on work performance. The employees see these changes as being con-

tractual in scope and therefore seek to have BN's action enjoined while negotiation runs its course.

BN agrees that there is an established course of conduct between the union and the railroad. It sees the past practice as having given BN the power to use reasonable means to investigate possible drug or alcohol abuse on the job whenever there appeared some evidence that an employee was violating Rule G. In the past, most of the violations involved drinking on the job or reporting drunk for work. Alcoholic intoxication manifests itself in physically apparent ways. The drunken employee may exhibit the odor of alcohol on his breath, may have slurred speech or a stumbling gait. When a supervisor notices an employee acting in a way which suggests intoxication, he has the power to remove the employee from service. Of course, the employee always has the opportunity to prove that he is not under the influence. This routine has been reasonably satisfactory in the past when the chief source of Rule G violations was alcohol. But the use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. The intoxicating effect of these substances is said to be primarily mental or emotional; a user's judgment or clearheadedness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene. BN argues that in order to deal with the threat of serious incidents caused by drug abuse it is entitled to use all reasonable means which are available so long as it first has some cause to believe that the employee has abused drugs. The occurrence of a human-error accident or safety violation or on-the-job injury in which a failure of judgment has been a factor is, it says, sufficient cause to suspect that drug abuse may have been the cause and to initiate further

investigation. BN says that the principle is the same as under the former policy: that is, upon some cause for suspicion, the company is entitled to take the employee out of service and use reasonable means to investigate. Believing that this is at most a minor change in working conditions, BN unilaterally imposed the modified policy and submitted the dispute to the National Railroad Adjustment Board, which is the proper method for resolving minor disputes. Having done so, BN asserts that it has fully complied with the Railway Labor Act and that this Court is without jurisdiction to interfere.

II.

We deal first with the dispute as to post-incident testing. On this part of the case, the District Court essentially agreed with BN's view and accordingly denied the injunction sought by the employees. Since this case comes to us in the context of an appeal from the denial of a preliminary injunction, our power to review is limited to whether the trial court clearly erred in its characterization of the facts, made a mistake of law, or abused its discretion in considering the equities.

Relations between the union and the railroad company are governed by the Railway Labor Act, 45 U.S.C. §§ 151-188.[2] In recognition of the critical national importance of uninterrupted commerce by rail, the Act is designed to provide for the prompt and orderely settlement of both fundamental contractual disputes and of grievances between union and management, so as to avoid the disruption of commerce which would be occasioned by strikes or other means of self-help by either side. 45 U.S.C. § 151a. The Act imposes on both employees and the railroad the duty to negotiate whenever a dispute arises. 45 U.S.C. § 152 First, Second. However, beyond the initial stages

[2] BN argues in the alternative that the Railway Labor Act does not apply at all, that it has a "management prerogative" to put into effect unilaterally the proposed changes. We reject this position.

of negotiation, the Act distinguishes between "major" and "minor" disputes.[3]

For the major type of dispute, i.e., one which seeks to change the rates of pay, rules, or working conditions in a way not contemplated by the collective-bargaining agreement, the Act requires the parties to seek settlement through the noncoercive means of negotiation, mediation, voluntary arbitration, and conciliation before resorting to self-help. Major changes in the relation-

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[3] The terms "major" and "minor" are not found or defined in the Act, which speaks of "change[s] in agreements affecting rates of pay, rules, or working conditions," 45 U.S.C. § 156, as one kind of dispute, and of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. § 153(i), as another. The accepted distinction between major and minor disputes is found in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945). There, the Court said that major disputes are those which arise

> over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. . . .
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> . . . [They are] the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid.

Id. at 723-24, 65 S.Ct. at 1290. A minor dispute, on the other hand,

> contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.
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> . . . [Minor disputes] seldom produce strikes. . . .

Id. at 723-24, 65 S.Ct. at 1289-90 (footnote omitted).

ship between employees and the railroad may not be implemented unilaterally. See 45 U.S.C. § 156. In a minor dispute, on the other hand, minor changes in working conditions may be implemented while settlement is sought through arbitration before the National Railroad Adjustment Board. See 45 U.S.C. § 153.

The question whether a dispute is major or minor determines the degree to which a federal court may become involved in the dispute. If the dispute is major, the courts have broad powers to enjoin unilateral action by either side in order to preserve the status quo while settlement procedures go forward. Such an injunction may issue without regard to the usual balancing of the equities. *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir.1972). But if the dispute is only minor, the court's power is more limited since the NRAB has exclusive jurisdiction over such minor disputes. The traditional power to enjoin under equitable principles remains, but in the usual case it is inappropriate to exercise this power since irreparable loss and inadequacy of the legal remedy cannot plainly be shown until the NRAB has had an opportunity to act. See *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567, 66 S.Ct. 322, 325, 90 L.Ed. 318 (1946). In rare cases, however, an injunction may be necessary even in a minor dispute in order to preserve the jurisdiction of the NRAB, i.e., to keep the dispute from growing into a major one while the settlement process is under way. *Locomotive Engineers v. Missouri-Kansas-Texas Railroad*, 363 U.S. 528, 533-34, 80 S.Ct. 1326, 1329-30, 4 L.Ed.2d 1379 (1960). The court must take care, however, that its injunction does not serve to adjudicate the merits of the case, which remain within the jurisdiction of the NRAB until that tribunal has acted. *Ibid.*

Whether a dispute is major or minor depends on whether it is arguably comprehended within the agree-

ment of the parties. The court must first determine what that agreement is. Since, as a practical matter, it is impossible for the written collective-bargaining agreement to describe every possible permutation of working conditions which might arise, it is not unusual for the parties to a labor agreement to develop working relationships, customs, and practices which are understood to be the norm, but which are nowhere reduced to a formal contract term. When longstanding practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were a part of the collective-bargaining agreement itself. Such practices have been described as the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose." *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 153, 90 S.Ct. 294, 301, 24 L.Ed.2d 325 (1969).

This Court has said that a dispute is minor if the agreement is "reasonably susceptible" of the interpretations sought by both the employer and the employees. *Independent Federation of Flight Attendants v. Trans World Airlines*, 655 F.2d 155, 158 (8th Cir.1981). Other courts have said that a dispute is minor if the employer's action can be arguably justified under the terms of the existing agreement, see, *e.g.*, *REA Express, Inc. v. Brotherhood of Railway, Airline, and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.), *cert. denied*, 409 U.S. 892, 93 S.Ct. 115, 34 L.Ed.2d 149 (1972), or that the dispute is minor unless the employer's argument that its actions are within the contract is "obviously insubstantial," see *Airlines Stewards & Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969). These locutions are essentially the same in their result. They illustrate the relatively light burden which the railroad must bear in showing that its

actions are at most minor changes and thus within the status quo.

III.

Applying these principles to the facts of the present case, we note that nothing in the collective-bargaining agreement refers in any way to Rule G or to enforcement or investigation methods. Nevertheless, we agree with the District Court that the union has long shared in BN's concern over the abuse of alcohol and drugs by employees on the job. Accordingly, the parties have acquiesced in certain detection and investigation methods over the years, and these practices may fairly be considered to have become the status quo. That being so, the railroad may not depart from these established practices in such a substantial way as to abrogate the implied contractual term which they represent. But so long as the railroad keeps within the bounds of this understanding, the employees are not entitled to an injunction against minor changes in method which are reasonably within the agreement.

The District Court found as fact that in the past BN had relied on the sensory observations of supervisors as its means of detecting Rule G violations, and that "such practice, which existed over a substantial period of time, became the only acceptable method of detection to both parties." *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad*, No. [sic] 642 F.Supp. 41, *reprinted in* Appellant's addendum at 7 (N.D.Ia. 1985). This accepted method of detection applied only to alcohol-abuse problems, which have, until recently, been the major focus of concern of both parties. Underlying this detection method was the principle that BN could not or would not remove an employee from the job or investigate for possible substance abuse without some reason for suspecting that employee. In other words, there were no at-large screening of employees or random searches. The District Court described the threshold level of sus-

picion as a "modicum of evidence" without elaborating on what that meant. *Ibid.* We note that BN's legal counsel, in describing the established policy, stated that an employee could be removed from service pending further investigation upon a showing of "probable cause." D.R. at 144-45. We doubt that this term was intended in its usual criminal-law sense; there was evidence from which the District Court could reasonably have concluded that some lower quantum of suspicion was sufficient under the parties' established practice. *Cf. Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 620 F.Supp. 163, 171 & n. 8 (D. Mont.1985), *appeal pending*, No. 85-4138 (9th Cir. argued July 8, 1986). (In a similar case challenging BN's drug-enforcement methods, the District Court used the term "modicum of evidence" and declined to speculate whether that term was more akin to "probable cause" or to "reasonable suspicion" as known in the criminal law.) Nevertheless, whatever the actual quantum of evidence the parties' past practice allowed, we find the record to be clear that suspicion must be particularized in one or more employees and must be based on something more solid than speculation or rumor before the railroad may act. The union's acquiescence in BN's past methods of enforcement was hardly intended or understood by either party to authorize a dragnet. See *Brotherhood of Locomotive Engineers, supra*, 620 F.Supp. at 171-72, invalidating a random-search policy.

The union does not deny that the railroad has the right to ensure the safety of its operations by removing from service any employee who is unable to perform his duties safely. The past practice of the parties shows that there has been little objection to the railroad's exercising this prerogative whenever common-sense observation of a particular employee suggested that the employee was impaired. Indeed, in the past no further testing or detection was necessary once a supervisor had

determined through observation that all was not well with the employee. What the railroad has done now is to add a more refined step, the urine test, to confirm the observation of the supervisor. Since the test can be required only upon some showing that the employee may be impaired, the ground rules between the union and the railroad have not changed significantly; suspicion of impairment is still required; instead of simply taking the suspected employee out of service, the railroad now seeks to confirm its suspicion before taking that step. We find no error in the conclusion of the District Court that this amounts, at the most, to only a minor change in working conditions. Accordingly, the Court properly declined to issue the status-quo injunction sought by the employees.

The policy that BN is thus left free to follow includes, in some circumstances, testing all the members of a crew. This will occur, however, only after an "incident" happens, and only when individual responsibility is not clear. BN's own statement of its policy emphasizes this point: "BN intends to continue implementing this policy in a common sense manner. For example, where individual responsibility is clear and other crew members are not involved in the action causing the incident, a urinalysis test should only be required of the individual crew member having such exclusive responsibility for the action triggering the incident." D.R. at 69. We do not understand BN's policy to permit testing on a less discriminating basis, and we express no view on whether a broader testing policy would be such a serious departure from past practice as to give rise to a major dispute.

To the extent that the District Court's order left BN free to implement its new post-incident testing policy, it is affirmed.

FAGG, Circuit Judge, joined by WOLLMAN, Circuit Judge, concurring.

To ensure the safety of its operations, BN seeks to eradicate on-the-job drug abuse. In response to the revelation that "several serious accidents on the railroad [were] related to abuse of drugs on the job," *ante* at 1017, BN has understandably expanded the scope of its post-incident testing as well as its periodic and return-to-work medical examination.

We agree that BN's post-incident testing program is a minor dispute within the context of these parties' collective bargaining agreement. It is also our view that addition of a drug screen to the routine urinalysis phase of an established medical examination program is a minor dispute.

BN's past practice of requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees are fit for duty is not challenged. Indeed, the union does not deny BN "has the right to ensure the safety of its operations by removing from service any employee who is unable to perform his duties safely." *Ante* at 1023. Basically, all that is involved in the parties' dispute is the extent to which the urinalysis component of these examinations may be refined in order to predict safe employee performance.

It is beyond dispute the drug screen is a new technique; the underlying purpose of the medical examinations, however, remains the same—to ensure all BN employees are fit for duty. The drug screen is nothing more than a method designed to detect the presence of a newly emerging threat to that fitness.

The use of a more comprehensive urine test has not significantly changed the ground rules between BN and the union. It should come as no surprise to the parties that the components of a work fitness medical examination will change with the times. Because BN and the union are involved in a dispute over the scope of BN's

actions designed "to ensure that all employees are fit for duty"—actions which are arguably justified—this dispute should be submitted to the National Railroad Adjustment Board.

Accordingly, to the extent that the order of the District Court enjoined BN's proposed new medical-examination policy, it is reversed, and BN is free to proceed with this policy, as well as with post-incident testing.

ARNOLD, Circuit Judge, dissenting in part.

The second major issue arises out of BN's addition of a "drug screen" to the medical urinalysis which is a part of scheduled examinations given to employees on a periodic basis and when they return from extended absence or furlough. In the past, the railroad has required of employees a periodic and comprehensive medical examination in order to ensure that all employees are fit for duty. Recently, medical examinations have been extended to returning seasonal employees, those who work for part of the year and then are furloughed for three months or more. This examination has always included laboratory examination of urine and blood samples. The change of which the employees complain is the railroad's addition of the drug screen to this urinalysis. This new examination is universal and indiscriminate, in the sense that it is imposed without regard to any degree of suspicion that the employee is working while impaired. In this way it differs significantly from post-incident testing. There is no precedent in the relationship between employees and railroad for this sort of probing into the private behavior of employees, and the District Court did not clearly err in finding that in instituting such a regimen of testing without first requiring some showing of particularized suspicion the railroad was effecting a major change in working conditions.

The railroad argues that this program of indiscriminate testing is a necessary element of determining med-

ical fitness of employees. It asserts that the results of positive tests are kept strictly confidential and that employees who test positive are referred for counseling in the company's Employee Assistance Program but are not subject to removal from employment or other discipline. But as a practical matter, the fact that an employee has been sent to the Employee Assistance Program is no secret. The Employee Assistance Program is informed by the Medical Department of the positive drug-screen result; the employee's supervisor is aware that the employee is being counseled; failure to cooperate with the program results in medical disqualification regardless of whether the employee is "drug-dependent" or not. D.R. at 25. The railroad's program of universal drug-testing could result in the dismissal of an employee without any prior suspicion of his use of drugs. This is a major departure from the established practice between employees and railroad. Such a change cannot go forward without appropriate negotiations between the parties. The District Court acted properly under the Railway Labor Act by issuing a status-quo injunction prohibiting the railroad from proceeding with this portion of the program.

The railroad and the employees may ultimately come to an understanding that Burlington Northern's proposed method of medical intervention in employee drug-abuse problems is the best way of approaching this problem. However, that result must be reached through arm's-length bargaining between the parties, not through unilateral compulsion on the part of the railroad. Thus, I think the injunction issued by the District Court should remain in force pending negotiation of the major change proposed by the railroad.

From so much of this Court's action as reverses the order of the District Court, I respectfully dissent.

STATUTORY PROVISIONS OF THE RAILWAY LABOR ACT

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agree-

ment promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such places of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provision of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference,

influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his

labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a

condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the

organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this

section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of

this title and which represent employees in engine, train, yard, or hostling service: *Provided, however*, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the

parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District

Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph

(p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in

carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such lim-

ited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is

hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be

agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Civil Action No. CV-85-055-GF

HONORABLE PAUL G. HATFIELD

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

JOINT STIPULATION OF FACTS

1. Plaintiff Brotherhood of Locomotive Engineers (BLE), an unincorporated association, is a railway labor organization which represents in collective bargaining the craft of locomotive engineers employed on virtually all of the nation's railroads, including Defendant BN, and is a "representative" of employees within the meaning of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

2. Defendant Burlington Northern Railroad Company (BN) is a corporation duly qualified to do business in Montana, is engaged in the transportation of goods and commodities by rail in interstate commerce and is subject to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* Both Plaintiff and Defendant are parties subject to the provisions of the Railway Labor Act.

3. At all material times and for many years, BN has had in effect a "Rule G," a safety rule, reading as follows:

> Rule G. The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

4. Operating and safety rules of BN are binding on employees unless modified or restricted by the collective bargaining agreements.

5. None of the eight collective bargaining agreements currently in effect between BLE and BN contain any restriction on BN's right to enforce its operating and safety rules, including Rule G.

6. The use of marijuana, cocaine, controlled substances and alcohol is known to impair safe operation of trains and equipment.

7. Federal and state criminal laws prohibit the use and possession of marijuana, cocaine and other controlled substances.

8. Section 64-14-1004, Montana Statutes, makes it illegal for locomotive engineers, conductors, dispatchers or telegraph operators to be intoxicated while on duty.

9. At all material times and for many years, BN had in effect Rule 702(B) which relates to insubordination and reads as follows:

> Employees must comply with instructions from the proper authority.

10. Following two separate train collisions in April, 1984, resulting in the deaths of seven employees, BN intensified its Rule G enforcement policy.

11. Exhibit 1 is a true and correct copy of a letter dated April 23, 1984, sent to A. E. Egbers, BN's Vice President of Labor Relations, by R. E. Pelava, BLE General Chairman, in which BLE proposed two agreements concerning the prevention of alcohol and drug abuse. The first proposed agreement was referred to as a "Peer Referral Agreement" and was designed to encourage employees to refer abuser employees to rehabilitative help. The second proposed agreement was referred to as a "Rule G By-Pass Agreement" and was designed to permit abuser employees to bypass traditional discipline in exchange for rehabilitative help.

12. Exhibit 2 is a true and correct copy of a letter dated May 11, 1984, sent to all operating employees by Charles J. Bryan, BN's Senior Vice President of Regional Operations, concerning BN's intensification of its Rule G enforcement policy.

13. Exhibit 3 is a true and correct copy of a letter dated June 6, 1984, sent to C. J. Bryan by R. E. Pelava, BLE General Chairman.

14. Exhibit 4 is a true and correct copy of a letter dated June 29, 1984, sent by C. J. Bryan to R. E. Pelava in response to Mr. Pelava's letter dated June 6, 1984.

15. During the months of May through August, 1984, BN and BLE met on several occasions to discuss proposals for a "Peer Referral" and "Rule G By-Pass Agreement." The last such meeting took place on August 30, 1984, during which time BLE informed BN that BLE had filed a complaint in the U.S. District Court for the District of Montana to challenge BN's use of canine inspection teams. The complaint was captioned *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company* and was docketed as Civil Action No. CV-84-213-GF.

16. After receiving knowledge that BLE had filed its complaint, the parties reached an agreement entitled

"Drug and Alcohol Abuse Prevention Program." Exhibit 5 is a true and correct copy of this agreement reached on August 30, 1984.

17. Exhibit 6 is a true and correct copy of a memorandum dated November 5, 1984, with an attached form entitled "Consent for Toxicological Test" sent to D. E. Baker, et al, from C. J. Bryan concerning BN's post-accident urine testing policy.

18. Exhibit 7 is a true and correct copy of a letter dated December 7, 1984 sent to C. J. Bryan, et al, from R. E. Pelava concerning BLE's objections to BN's post-accident testing policy.

19. After Pelava sent his December 7, 1984 letter to BN, discussions took place between Mr. Pelava and Mr. Dagnon, BN's Vice President-Labor, concerning BLE's objections to the new policy, the consent forms and specific incidents in which those employees represented by BLE had been subjected to discipline pursuant to BN's post-accident testing policy. These discussions, in part, led to the reinstatement of certain affected employees and to BN's issuance of a revised policy statement in a memorandum dated December 21, 1984, sent to W. W. Francis, et al, from C. J. Bryan. Exhibit 8 is a true and correct copy of the December 21, 1984 memorandum.

20. Under BN's present Rule G enforcement policy, employees are subject to post-accident urine testing in the following cases:

1. *Human Factor Accidents—Major*

   A. Major collisions involving more than one train or one switching movement.

2. *Human Factor Accidents—Minor*

   A. Derailments in yard or industry switching.

   B. Failures to respond to signals.

C. Run through switches or derail.

D. Failures to secure.

3. Cases in which a BN supervisory official detects any employee displaying abnormal behavior.

The post-accident testing policy applies only where there is a causal connection between the accident and an employee's responsibility for the accident. Post-accident testing is not required when the cause of the accident is clearly related to other than employee error—i.e., equipment failure.

21. In the event an employee becomes involved in any of the circumstances described in paragraph 20, the following statement is read to the employee:

> "THIS IS TO ADVISE THAT THIS INCIDENT MAY INVOLVE OPERATING RULE VIOLATIONS (OR, AS APPROPRIATE, ABNORMAL BEHAVIOR). UNDER BN'S EXISTING POLICY GUIDELINES, WE ARE REQUESTING THAT YOU GIVE A URINE SAMPLE TO BN, OR TO A DESIGNATED MEDICAL FACILITY IN ORDER TO EXONERATE YOURSELF FROM AN ALLEGED RULE G VIOLATION. THE URINE WILL BE USED TO DETECT THE POSSIBLE PRESENCE OF ANY DRUGS OR ALCOHOL IN YOUR BODY. WE SHOULD ALSO ADVISE YOU THAT A REFUSAL TO GIVE A URINE SAMPLE WILL BE CONSIDERED A VIOLATION OF RULE G AND 702B*."

22. Subsequent to the issuance of Mr. Bryan's November 5, 1984 memorandum, employees represented by BLE and other BN employees have been subjected to BN's post-accident testing policy, in accordance with the conditions outlined in paragraph 20, and are required to submit to mandatory urine testing for drugs and/or

alcohol due to their involvement in accidents where human causation is a factor. In addition, employees who have refused to submit to the mandatory post-accident testing have been charged with violation of Rule G and, in some instances, violation of Rule 702(B) and have accordingly been removed from service and disciplined pursuant to the disciplinary procedures outlined in the collective bargaining agreements and also, as subject to the procedures of the Railway Labor Act. In November and December, 1984, BN subjected 111 employees to its post-accident urine testing. Eighty-one percent of the employees tested had negative results, 9% positive and 9% declined to take the test.

23. On June 5, 1984, the Federal Railroad Administration (FRA) issued its notice of proposed rulemaking regarding "Control of Alcohol and Drug Use in Railroad Operations" (FRA Docket RSOR-6), Exhibit 9 is a copy of that FRA notice.

24. The FRA proposed rules were published in the *Federal Register* on June 13, 1984, (Volume 49, No. 114).

25. Among the proposed FRA rules is § 218.109 "Authority to Test for Cause." A copy of that section is identified as Exhibit 10.

26. On Friday, January 4, 1985, R. E. Pelava informed James B. Dagnon that BLE was no longer interested in further discussions regarding BN's post-accident testing policy and would take whatever appropriate action the BLE deemed advisable.

27. Exhibit 11 is a true and correct copy of a "Notice of Intent to File an Ex Parte Submission" dated January 7, 1985, which was sent to Nancy Dever, Executive Secretary, National Railroad Adjustment Board, by James B. Dagnon.

28. On February 7, 1985, BN filed its submission to the First Division of the National Railroad Adjustment

Board (NRAB), which the Board docketed as B-1812. Exhibit 12 is a true and correct copy of BN's submission (less attached exhibits).

29. BLE's opening submission to the NRAB in Docket B-1812 was originally due on March 7, 1985. BLE requested and was granted an extension for the filing of its submission until April 6, 1985.

/s/ Richard J. Schreiber
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Civil Action No. CV-85-055-GF

HONORABLE PAUL G. HATFIELD

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant

AFFIDAVIT OF CHARLES J. BRYAN

My name is Charles J. Bryan and I am a resident of Overland Park, Kansas. I am employed by Burlington Northern Railroad Company (BN) as Senior Vice President-Regional Operations, with offices at 9401 Indian Creek Parkway, Overland Park, Kansas.

In that capacity, it is my responsibility to oversee the day-to-day train operations on BN with the highest priority to safety and efficiency of such operations. In that respect, it is essential that such train operations be conducted in accordance with company operating rules which are designed to assist in meeting this objective.

I have reviewed and am familiar with the allegations and/or facts involved in those matters described in the Brotherhood of Locomotive Engineers' (BLE) complaint for preliminary injunction filed in the above-captioned case, as well as their memorandum in support of a motion of March 7, 1985, and the supporting affidavit of R. E. Pelava. I am personally aware that BN has utilized compulsory urine testing to determine Rule G violations since at least 1978 and issued appropriate discipline, where justified, subject to the grievance process provided for in collective bargaining agreements and the Railway Labor Act.

If called to testify as a witness, I can completely testify to the following facts:

1. BN is the nation's largest railroad in terms of track mileage, operating through 29 states and in two Canadian provinces. BN, in addition to its freight service, operates extensive passenger service, including Amtrak operations throughout the western United States as well as a major commuter service in Chicago. As part of its freight operations, it transports hazardous materials in interstate commerce. Clearly, this necessitates the highest degree of attention to safety of train operations. Indeed, public safety is of paramount interest to BN for its employees, rail passengers as well as the general public.

2. There exists throughout the railroad industry, including BN, a safety operating rule known as Rule G which prohibits the use or possession by an employee of drugs or alcohol while on duty or on company property and further prohibits an employee from reporting to duty while under the influence of any drug or alcohol.

3. Historically, BN has used various means and procedures to enforce Rule G and has never negotiated with the BLE or any other union regarding its enforcement of operating rules, including Rule G, since they are not

part of any collective bargaining agreement but have always been unilaterally promulgated by the carrier. Among the past practices used to enforce Rule G has been the utilization of post-accident testing including the use of urine, blood or breath test. For example, during the period from January 1, 1981, through March 1, 1984, testing had been an essential feature of BN's enforcement program and approximately 100 BN employees were subjected to discipline based on test results, including 13 engineers. Attached as Exhibit 1 is a listing of those employees who were subjected to such testing with positive results. Obviously, this does not include a much greater number of BN employees who were also tested during the same period where the results were negative. During this period, BLE registered no objections to BN's testing practices.

4. As a result of two catastrophic train accidents in the spring of 1984, BN intensified its program of Rule G enforcement practices, including compulsory urine testing based on just cause or reasonable suspicion standards, after an accident where there were indications of human causal factors related to the accident. BN's current post-accident testing program is fully described in my memorandums of November 5, 1984, and December 21, 1984, true and accurate copies being attached hereto as Exhibits 2 and 3, respectively.

5. The results from the intensification of BN's post-accident testing policy since November 2, 1984 are summarized on Exhibit 4, attached hereto, which reflects post-accident testing of 329 employees during that time frame. Seventy-six percent of the tests were negative, 13% positive and 6% of the employees declined to take the test.

6. BN's post-accident testing program is similar to programs being conducted on other railroads. I am BN's member on the OT General Committee of the American

Association of Railroads (AAR) and, in that capacity, receive data regarding drug and alcohol problems within the railroad industry. For example, I recently received a copy of a letter from Mr. Lacy, Southern Pacific's Vice President of Operations, dated January 30, 1985, transmitting a letter from Southern Pacific's (SP) Chairman McNear to FRA Administrator Riley. Mr. McNear's letter included a summary of the results of the SP's post-accident testing program since their intensification of the program commenced in the summer of 1984. It is interesting that their results closely parallel BN results, with 400 post-accident tests conducted on the SP resulting in 61 positive tests and 14 refusals of employees to take the test. The SP totals of positive tests and refusals to take the test also approximate 18% of the total tests conducted. A copy of Mr. Lacy's letter is attached as Exhibit 5.

7. BN's dramatic reductions in accident costs are even recognized by the BLE. For example, Exhibit 19 to Mr. Pelava's affidavit reflects these results for recent months after intensification of BN's post-accident testing policy, pursuant to my November 5, 1984 memorandum. More recent data for January and February, 1985 v. 1984 indicate a continuation of this trend. BN's accident cost per train mile for January and February, 1985 was reduced 28% over costs for the comparable period in 1984. (.05 v. .07). While Mr. Pelava seeks to attribute BN's reductions in accident costs solely to the Rule G Peer Referral Program, an objective evaluation of the facts clearly indicates otherwise, i.e., only eight BN employees have participated in such programs to date, including one BLE member and seven UTU members. As BN, SP has also registered dramatic reductions in human factor accidents since intensification of its post-accident testing program in the summer of 1984. The most recent data (January, 1985 v. January, 1984) indicates a drop of 53% in human factor accidents. (Exhibit 5). The SP also directly attributes these reductions,

primarily, to their intensified Rule G enforcement policies.

8. Both the BN and SP testing programs are very similar to the proposed FRA regulations on just cause standards for requiring post-accident testing. Attached as Exhibit 6 is § 218.109 of those proposed regulations ("Authority to Test for Cause"). And, in some respects, they are even more expansive than BN and SP's existing policies.

9. In Mr. Pelava's affidavit (¶¶ 11-14) he cites alleged abuses in implementation of BN's post-accident testing policies and transcript references of investigation proceedings involving charges pursuant to the post-accident testing policy. Obviously, in a railroad the size of BN, there will be examples of local misapplication of company policies. However, as indicated in my November 5, 1984 memorandum and reiterated in my December 21, 1984 memorandum, it is BN's intent to implement this policy in a common sense manner. It is and will continue to be BN's policy to correct any isolated misapplication of those policies by its line officers.

10. Mr. Pelava also contends in his affidavit that BN has never assessed discipline for refusing to take urine or blood tests (¶ 7) and that prior to November, 1984, BN enforced Rule G only through visual observation (¶ 6). Mr. Pelava is incorrect in both of these assumptions. I am personally aware of the fact that BN enforced Rule G through testing procedures and the purpose of my November 5 directive was to intensify the testing program to cover all human factor accidents as well as operating rule violations. I am also personally aware of many incidents, predating my November 5 directive, where employees were charged with Rule G and Rule 702(B) violations for refusal to take blood or urine tests.

11. It is my opinion that the facts document that BN's past practices have included post-accident testing and the intensification of such procedures is an essential tool in maintaining a safe working environment on this railroad. It is also my opinion that the facts document that intensification of reasonable Rule G enforcement policy, including post-accident testing, has a direct and positive effect on enhancing safety of train operations.

12. I enthusiastically support BN's Rule G Peer Referral and By-Pass Program but in order to maximize the effectiveness in combating the drug and alcohol problem on this railroad, it requires a two-pronged effort—i.e., reasonable and effective enforcement as a deterrent *plus* a Peer Referral and Rule G By-Pass Program.

13. It is my further opinion that any dispute or controversy between BLE and BN regarding the implementation of BN's post-accident testing program can readily be resolved pursuant to the mandates of the Railway Labor Act. We stand ready, willing and able to discuss any problems regarding implementation of the policy and if unresolved between the parties to submit it to binding arbitration as prescribed in the Railway Labor Act. It is my understanding that our Labor Relations Department has submitted the issue of BN's post-accident testing policies to the National Railroad Adjustment Board for arbitration. Pending such resolution by the NRAB, I believe it is essential that the paramount public interest in safety of train operations dictates that what has been a documented successful program not be thwarted pending such arbitration decision.

/s/ Charles J. Bryan
CHARLES J. BRYAN

BRYAN EXHIBIT

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
9-19-81	Tim O'Keefe	Carman	Guernsey, Wyo.	Urine	Drug	Positive
11-26-81	Elizabeth Ballard	Laborer	Alliance, Neb.	Urine	Drug Alc.	Unknown
8-15-—	R.D. Leenerts	Brakeman	Alliance, Neb.	Breath	Alc.	.151
7-19-81	N.L. O'Dell	Engineer	Alliance, Neb.	Urine	Drug	Positive-THC
7-19-81	L.C. Miller	Brakeman	Alliance, Neb.	Urine	Drug	Positive-THC
8-19-81	James Baur	Fireman	Alliance, Neb.	Urine	Drug	Positive-THC
6-4-81	Barry Montgomery	Carman	Pensacola, Fla.	Blood & Urine	Drug Alc.	Unknown
6-30-81	Paula Miller	Clerk	Alliance, Neb.	Breath	Alc.	.104
3-31-81	M.R. Shadley	Track Laborer	McCook, Neb.	Breath	Alc.	.074
3-7-81	Robert Sweet	Brakeman	Pasco, Wash.	Blood	Alc.	Unknown
2-27-81	L.C. White	Switchman	Ft. Smith, Ark.	Breath	Alc.	.11
3-9-81	Steve Shiets	Engineer	Alliance, Neb.	Blood	Alc.	.04
3-4-81	M.L. Johnson	Brakeman	Alliance, Neb.	Breath	Alc.	.067
1-14-81	G.A. Lawson	Conductor	Alliance, Neb.	Blood	Alc.	.001
11-18-80	Harold Prince	Accounts Receivable Clerk	Denver, Colo.	Blood	Alc.	Unknown
9-17-—	Alan Lichti	Laborer	Minden, Neb.	Blood & Urine	Drug Alc.	Negative Drug; Bac. .13

BRYAN EXHIBIT—Continued

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
9-1-82	Roy Bennett	Repairman-Water Service	Guernsey, Wyo.	Urine	Drug Alc.	Positive THC; Bac. .08
9-6-82	Jesse Gilmore	Switchman	Denver, Colo.	Blood	Alc.	.06
8-21-82	John Scheidt	Engineer (Amtrak #6)	Akron, Colo.	Breath	Alc.	Positive
8-21-82	Tom Witlam	Fireman (Amtrak #6)	Akron, Colo.	Breath	Alc.	Positive
7-30-82	Terry Serke	Machine Operator	Dewey, S.D.	Blood & Urine	Drug Alc.	Blood-Neg. Pos.-THC.
4-2-82	Peter Netland	Clerk	Duluth, Minn.	Blood	Alc.	.302
10-21-82	Hal Myers	Engineer	Centralia, Ill.	Breath	Alc.	.00 Neg.
3-21-82	John Goutz	Machinist	Springfield, Mo.	Blood	Alc.	.02
3-7-82	David Okasmit	Brakeman	Gillette, Wyo.	Blood	Alc.	.160
12-18-81	Edward Smith	Carman	Alliance, Neb.	Urine	Drug	Positive-THC
11-21-81	Lynn Brown	Carman	Alliance, Neb.	Urine	Alc.	Unknown
12-8-81	Marvin Rose	1st Class Mechanic	Ansley, Neb.	Urine	Drug	Positive-THC, Cocaine
12-4-81	Ronald Taylor	Truck Driver	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
12-4-81	Pat Webster	Laborer	Alliance, Neb.	Urine	Drug Alc.	BAC .25

12-4-81	Terry Webster	Camp Tender	Alliance, Neb.	Urine	Drug Alc.	BAC .33
12-4-81	Dave Denesia	Laborer	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
12-4-81	Stanley Beeken	Laborer	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
12-4-81	Gregg Hagen	Laborer	Alliance, Neb.	Urine	Drug Alc.	Positive-THC
8-21-81	J.P. Schomoner	Engineer	Crawford, Neb.	Urine	Drug Alc.	Positive-THC
8-21-81	T.M. Julius	Conductor	Crawford, Neb.	Urine	Drug Alc.	Negative
8-21-81	L.S. Mentle	Brakeman	Crawford, Neb.	Urine	Drug Alc.	Positive-THC
8-21-81	R.J. Herrman	Brakeman	Crawford, Neb.	Urine	Drug Alc.	Positive-THC
9-3-81	P.M. Dinovo	Electrician	Alliance, Neb.	Blood	Alc.	Unknown
11-5-81	Dennis Frammell	Brakeman	Alliance, Neb.	Urine	Drug	Positive-THC
10-30-81	Daniel Taylor	Coach Cleaner	Alliance, Neb.	Urine	Drug	Positive-THC
10-30-81	George Schaneman	Carman	Alliance, Neb.	No Test - Refused		—
11-15-81	John Clackley	Electrician	Alliance, Neb.	Urine	Alc.	Unknown
11-13-81	Sherman Lenhart	Laborer	Alliance, Neb.	Urine	Alc.	Unknown
10-3-81	Steven Hoff	Machinist	Alliance, Neb.	Urine	Drug	Unknown
10-3-81	Sam Brisby	Laborer	Alliance, Neb.	Urine	Drug	Unknown
8-12-82	Jackie Richards	Machinist	Livingston, Mt.	Breath	Alc.	Positive
7-25-82	Erwin Sample	Engineer	Alliance, Neb.	Urine	Alc.	.08

BRYAN EXHIBIT—Continued

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
7-31-82	Steven Vasely	Engineer	Alliance, Neb.	Urine	Alc.	.177
7-23-82	Clarence Sweet	Brakeman	Alliance, Neb.	Urine	Drug Alc.	Unknown
5-6-82	James Marshalek	Machinist	Superior, Wisc.	Blood	Alc.	Unknown
4-16-82	Andrew Brown	Lift Truck Operator	Cicero, Ill.	Blood	Alc.	.322
6-26-82	Cecil Tiger	Carman	Tulsa, Okla.	Blood	Alc.	.183
2-16-82	Charles Writer	Welder	Ft. Smith, Ark.	Breath	Alc.	.23
9-13-81	Ron Stewart	Engineer	Springfield, Mo.	Blood	Alc.	.18
10-14-82	Karl W. Meass	First Class Carpenter	Missoula, Mt.	Blood	Alc.	.126
1-3-83	Gordon Kupka	Conductor	Springfield, Mo.	Blood	Alc.	Unknown
1-27-—	Jerry Cheek	Carman	Springfield, Mo.	Blood	Alc.	Hosp. Would Not Release
1-24-—	Tommy Roof	Engineer	St. Joseph, Mo.	Blood & Urine	Drug Alc.	Unknown
10-10-83	James Rayburn	Switchman	N. Kansas City, Mo.	Blood	Alc.	Unknown
2-3-84	Leon Young, Sr.	Brakeman	Kansas City, Mo.	Blood	Alc.	.261
12-27-82	Gary Blandheim	Carman	Seattle, Wash.	Blood	Alc.	Unknown
1-21-83	Chris Kionle	Drawbridge Op.	Portland, Ore.	Urine	Alc.	Unknown
1-26-84	Daniel Shea	Engineer	Spokane, Wash.	Blood	Alc.	.095
11-8-83	W.J. Everson	Brakeman	Galesburg, Ill.	Blood	Alc.	.174

1-28-84	Joseph Gallegos	Crane Operator	Cicero, Ill.	Blood	Alc.	.231
6-2-83	Kirt Slack	Conductor	Alliance, Neb.	Urine	Drug	Positive-THC
6-2-83	Brian Crouch	Brakeman	Alliance, Neb.	Urine	Drug	Positive-THC
5-20-83	John Connors	Track Dept. Laborer	Denver, Colo.	Blood & Urine	Drug Alc.	Negative-Drug; BAC .052
3-9-83	Terry Davis	Brakeman	Gillette, Wyo.	Breath	Alc.	.156
7-2-83	Maurice Skerfficus	Engineer	Lincoln, Neb.	Blood	Alc.	.262
8-2-83	Robert S. Rogers	Travelling Mechanic	Ft. Laramie, Wyo.	Breath	Alc.	.185
8-16-83	Brenda Sullivan	Crew Caller	Gillette, Wyo.	Blood & Urine	Drug Alc.	BAC .102; Drugs-Positive
8-28-83	David L. Brass	Truck Driver-Steel Gang	Alliance, Neb.	Urine	Drug	Unknown
8-28-83	Max Popper	Truck Driver-Steel Gang	Alliance, Neb.	No Test - Refused		
8-28-83	D. L. Rundle	Ass't Foreman-Steel Gang	Alliance, Neb.	No Test - Refused		
5-20-83	Wayne Bernhardt	Engineer (Train #122)	Alliance, Neb.	Urine	Drug Alc.	Positive-THC & Alc.
5-20-83	Jim Osborne	Brakeman (Train #122)	Alliance, Neb.	Urine	Drug Alc.	Positive-THC & Alc.
5-20-83	R. W. Mullanix	Conductor (Train #122)	Alliance, Neb.	No Test		
5-20-83	T. B. Horsham	Brakeman (Train #122)	Alliance, Neb.	Urine	Drug Alc.	Negative
8-1-83	Ed C. Coynar	Conductor	Gillette, Wyo.	Breath	Alc.	.047

BRYAN EXHIBIT—Continued

DATE	NAME	POSITION	LOCATION	TYPE OF TEST		RESULTS
11-7-83	J. L. Thompson	Car Inspector	Amarillo, Tex.	Blood	Alc.	.137
3-23-83	Louie Moser	Foreman of Cars	Lincoln, Neb.	Blood	Alc.	.133
8-16-83	Patti M. Wilde	Brakeperson	Guernsey, Wyo.	Urine	Alc.	.15
8-16-83	Jon A. Kershner	Brakeman	Guernsey, Wyo.	Urine	Alc.	.20
8-5-83	Jack Streich	Switchman	Denver, Colo.	Blood & Urine	Alc.	Unknown
11-29-83	F. E. Green	CTC Maintainer	Glendo, Wyo.	Urine	Alc.	.09
3-2-84	R. W. Russell	Brakeman	Gillette, Wyo.	Breath	Alc.	.043
3-1-84	J. R. Kenley	Brakeman	Gillette, Wyo.	Breath	Alc.	.110
3-1-84	D. R. Olson	Brakeman	Gillette, Wyo.	Breath	Alc.	.017
3-1-84	G. E. Sederberg	Engineer	Gillette, Wyo.	Breath	Alc.	.082
9-23-83	Donald Bloom	Claims Investigator	St. Paul, Minn.	Blood	Alc.	.08
11-19-83	Darrell Fluggs	Section Laborer	Staples, Minn.	Blood	Alc.	Unknown
1-25-83	David Kirshner	Laborer-Diesel Shop	Minneapolis, Minn.	Blood	Alc.	.25
10-29-82	John D. Lacy	Carman	Tulsa, Okla.	Blood	Alc.	.036
12-5-82	Jim Skellenger	Laborer	Vancouver, Wash.	Urine	Drug	Positive-THC
12-5-82	Lou Schinging	Laborer	Vancouver, Wash.	Urine	Drug	Negative
12-5-82	William Shuste	Laborer	Vancouver, Wash.	Urine	Drug	Positive-THC
8-29-82	William Kelly	Brakeman	Klamath Falls, Ore.	Blood	Alc.	.24
12-16-82	Bruce Dieteich	Brakeman	Alliance, Neb.	Blood	Alc.	.314

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Civil Action No. Civ-85-055

Honorable Paul G. Hatfield

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Plaintiff

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant

STATE OF TEXAS
COUNTY OF TARRANT

AFFIDAVIT OF JAMES B. DAGNON

My name is James B. Dagnon and I am employed by Burlington Northern Railroad Company (BN) as Vice President-Labor Relations with offices at 3000 Continental Plaza, 777 Main Street, Fort Worth, Texas 76102.

It is my responsibility as BN's senior corporate labor relations officer to represent the Company in labor relations matters between the carrier and the representatives of its employees. BN employees are currently represented

by 17 different labor unions, including, among others, the Brotherhood of Locomotive Engineers (BLE).

In that capacity, I am familiar with the allegations and/or facts involved in those matters described in the BLE's complaint filed in this case. I have also reviewed the BLE memorandum of March 7, 1984, in support of their motion for preliminary injunction and the supporting affidavit of R. E. Pelava.

If called to testify as a witness, I can competently testify to the following facts:

1. Relations between rail carriers and unions are governed by the Railway Labor Act (45 U.S.C. § 151, et seq.). One of the prime mandates of the Railway Labor Act (RLA) is the directive of Section 2, First (45 U.S.C. § 152, First) that disputes between the carrier and the representatives of its employees are, if at all possible, to be resolved peacefully commencing with voluntary conferencing of disputes between the parties and concluding with binding arbitration. This particular statutory scheme was designed to avoid potential disruptive interruptions of interstate commerce.

2. In this case, BLE is seeking to enjoin BN's policy of requiring post-accident urine testing of employees when there is just cause or reasonable grounds to suspect that the accident or incident was caused by employee error involving a violation of the Company's operating rules. The parameters of this program are detailed in Mr. Bryan's affidavit.

3. On December 7, 1984, Mr. R. E. Pelava, one of the four BLE General Chairmen representing BN employees, directed a joint letter to Messrs. Bryan, Matthews (BN's Senior Vice President, Employee Relations) and myself (Pelava) expressing concerns about the implementation of BN's post-accident testing policy. I interpreted Mr. Pelava's letter to constitute a threat to take action against BN unless the post-accident testing program was discontinued or modified. It was my belief that some of

the concerns expressed by Mr. Pelava were the result either of a misunderstanding of BN policy implementation or a possible misapplication of the policy by local BN supervisory officers.

4. In an effort to peacefully resolve the dispute concerning the interpretation of BN's policy, I, along with Mr. Ratcliff (BN's Assistant Vice President-Labor Relations), conferenced with Mr. Pelava in Denver, Colorado, on December 17, 1984. This discussion regarding the post-accident testing policy was undertaken to see whether it could be resolved by further voluntary conferencing between the parties, or arbitration pursuant to the statutory mandate of Section 83, First of the RLA (45 U.S.C. § 153 First), prior to any further action by BLE. Mr. Pelava indicated to me that he would study the issue further and agreed to pursue a voluntary conferencing of the dispute at a future meeting prior to commencing any action against BN.

5. Later in December, 1984, the other BLE General Chairmen representing BN employees expressed concerns similar to those of Mr. Pelava regarding the implementation of BN's post-accident testing policy. I personally contacted each of the BLE General Chairmen by phone indicating that it was BN's desire to seek a peaceful resolution of this interpretation question via the conferencing process or through the arbitration process. All three of the other BLE General Chairmen orally agreed not to launch any action against BN until further conferences could be held in an effort to peacefully resolve this dispute.

6. During all these discussions, I indicated a willingness to deal with any legitimate concerns regarding policy implementation or local isolated misapplications of that policy and, absent a voluntary resolution of the dispute, to submit the dispute under the normal arbitration process mandated by the RLA, or, if desired, for expedited arbitration handling by the National Railroad Adjustment Board (NRAB) or a public law board. At

that point, I was reasonably confident that continued efforts for a voluntary resolution of this minor dispute through the conferencing process was the preferred avenue by both BN and the BLE. However, on Friday, January 4, 1985, while I was in St. Paul, Minnesota, I was contacted by Mr. Pelava and advised that the BLE was no longer interested in a peaceful resolution of this dispute through the conferencing process.

7. BN's program to eliminate or minimize drug or alcohol abuse by its employees involves overriding considerations of public safety and the vital public interest in safety of train operations. It is BN's position that post-accident testing is based on a just cause and reasonable suspicion standard and is an essential feature in that policy program. Therefore, since the voluntary resolution of this dispute through the conferencing process was foreclosed by the BLE's notice of January 4, it was decided that BN should take the initiative and progress resolution of this dispute by invoking the arbitration provisions of the RLA and submit such dispute for handling by the NRAB pursuant to Section 3 of the Railway Labor Act (45 U.S.C. § 153). BN filed its notice of intent to submit such dispute for arbitration with the NRAB in Chicago on the morning of January 7, 1985. On February 6, 1985, BN filed its formal submission to the NRAB regarding this dispute, a copy of which is identified as a joint exhibit. BLE's submission was due to be filed with the NRAB on March 7, 1985, but they requested and were granted an extension of time for their filing.

8. I personally contacted Mr. Pelava and the other three BLE Chairmen on Saturday, January 5, and Sunday, January 6, and advised them of BN's intent to submit the dispute to arbitration with the NRAB in Chicago on Monday morning, January 7. I requested they join with us in seeking expedited arbitration, but they declined to do so.

9. In Mr. Pelava's affidavit (§§ 10 and 14) he makes reference to his concerns about changes in BN's policy implementation and of examples of local misapplication of the policy by BN's supervisory officers. This, of course, is consistent with my position that BN was willing to conference any such disputes and, if justified, correct any incidents which arose out of local misapplication of BN's post-accident testing policy or to consider changes in the implementation of the policy proposed by Mr. Pelava. As a result of my discussions and conferences with him, BN did correct any incidents of local misapplication of policy cited in § 14 of Pelava's affidavit. We also did, as indicated in § 10 of Pelava's affidavit, eliminate use of consent forms, replacing them with an oral warning.

10. I am familiar with the eight collective bargaining agreements currently in effect between BLE and BN. None of these agreements contain any limitation or restriction of BN's right to enforce its operating or safety rules. Absent such restrictions, or a pending effort to negotiate such restriction pursuant to a valid Section 6 notice, any dispute regarding the interpretation of existing agreements is a "minor" dispute under the RLA. That is why we submitted it for binding arbitration to the NRAB.

11. It is my opinion that the current BLE efforts to enjoin BN's post-accident testing program would totally negate any effective enforcement efforts by BN regarding its Rule G policy and would circumvent the statutory mandate of the Railway Labor Act that all such disputes be resolved either by voluntary conferencing between the parties or binding arbitration by the NRAB.

12. BLE is currently progressing grievances of employees disciplined for Rule G violations pursuant to BN's post-accident testing policy.

/s/ James B. Dagnon
JAMES B. DAGNON

THE STATE OF TEXAS
COUNTY OF TARRANT

SUBSCRIBED AND SWORN TO BEFORE ME this 15th day of March, 1985.

/s/ Patricia Ann Taylor
Notary Public

My Commission Expires: September 7, 1985

BURLINGTON NORTHERN RAILROAD

Overland Park, Kansas
November 5, 1984

PERSONAL AND CONFIDENTIAL

Messrs. D. E. Baker
R. E. Buchanan
W. W. Francis
W. A. Hatton
D. W. Scott
W. A. Thompson

In an effort to minimize and/or eliminate the prohibited use of alcohol and drugs on Burlington Northern property, the following is a restatement and amplification of BN's existing policy defining when "probable cause" exists sufficient to require urinalysis tests to detect possible Rule G violations by BN operating employees.

Action should be taken to send either (1) the entire crew or (2) individuals, when responsibility is clearly identified, to a clinic for a routine urinalysis sample in the following cases:

1. *Human Factor Accidents—Major*

   A. Major collisions involving more than one train or one switching movement.

2. *Human Factor Accidents—Minor*

   A. Derailments in yard or industry switching.

   B. Failures to respond to signals.

   C. Run through switches or derail.

   D. Failures to secure.

3. Cases in which a BN supervisory official detects any employee displaying abnormal behavior.

We want to emphasize that BN intends to continue implementing this policy in a common sense manner. For example, where individual responsibility is clear and other crew members are not involved in the action causing the incident, a urinalysis test should only be required of the individual crew member having such exclusive responsibility for the action triggering the incident. The Division Superintendent must have close involvement and it is mandatory that he sanction these tests. It is also essential that the "probable cause" requiring the urinalysis test be adequately documented along with the identity of the supervisory official requesting it.

It is to be emphasized that continued implementation of BN's existing policy in this regard will be fairly and equally applied. Further, no employees submitting to a urinalysis test will be removed from service pending test results unless there are other circumstances requiring their removal from service. If the urinalysis tests are positive, the employee should be removed from service pending investigation.

In accordance with existing policy guidelines, when it is determined that a urinalysis test is required, the attached consent form should be used. Should any clarification of this policy be needed, contact T. C. Whitacre of my office.

/s/ C. J. Bryan
C. J. BRYAN

Attachment

cc: Messrs. W. A. Drexel
T. J. Matthews
E. J. Currie
H. P. Burton

1107/1106

EXCERPTS FROM THE FEDERAL REGISTER

49 Fed. Reg. 24300-02 (June 12, 1984)

§ 218.105 Post-accident toxicological testing.

(a) *Mandatory testing procedures.* (1) Following each accident and incident described in paragraph (b) of this section, the railroad (or railroads) shall take all practical steps to assure that all covered employees of the railroad directly involved in the accident or incident provide blood and urine samples for toxicological analysis by FRA. Such employees shall specifically include the operating employees responsible for any train or switching movement involved in the accident or incident.

(2) Every reasonable effort shall be made to assure that samples are provided as soon as possible after the accident or incident. This paragraph shall not be construed to inhibit the employees required to be tested from performing, in the immediate aftermath of the accident or incident, any duties that may be necessary for the preservation of life or property. However, where practical, the railroad shall utilize other employees to perform such duties.

(3) Samples shall be obtained, preserved, marked, handled, and made available to FRA under such procedures (consistent with this subpart) as the Associate Administrator for Safety, FRA, shall prescribe.

(4) Where practical, employees shall be transported to a health care facility independent of the railroad company, such as a hospital, clinic, or physician's office, where the samples shall be obtained. In all cases blood shall be drawn only by a qualified medical professional or by a qualified technician subject to the supervision of a qualified medical professional. In seeking the cooperation of a medical facility in obtaining a sample under this subpart, the railroad shall, as necessary, make specific reference to the requirements of this subpart.

(5) (i) In the case of an injured employee, the railroad shall request the treating medical facility to obtain the samples. If the employee is unconscious or otherwise unable to affirm consent to the procedure and the treating medical facility declines to draw the sample, the railroad shall immediately make available to the facility the consent form required by paragraph (c) of this section and request that a blood sample be drawn. In the event the medical facility initially declines to cooperate in obtaining the required samples from an injured employee, the railroad shall immediately notify the Office of Safety, FRA, by telephone, through the appropriate FRA regional office or field office. FRA will then take appropriate measures to assist in obtaining the required samples.

(ii) Nothing in this subpart shall be construed to limit the discretion of a physician to determine whether drawing a blood sample is consistent with the health of an injured employee or an employee afflicted by any other condition that may preclude drawing the specified quantity of blood.

(6) (i) In the case of an employee fatality the railroad shall immediately notify the appropriate local authority (such as a coroner's office) of the fatality and the requirements of this subpart, requesting the local authority to assist in obtaining the necessary body fluid or tissue samples.

(ii) If the local authority takes custody of the deceased for the purpose of conducting an autopsy or toxicological tests, the railroad shall immediately notify the Office of Safety, FRA, by telephone, through the appropriate FRA regional office and shall immediately deliver to such authority the consent form required by paragraph (c) of this section. The FRA will contact the local authority to obtain appropriate body fluid or tissue samples for testing.

(iii) If the local authority does not immediately take custody of the deceased, the railroad shall notify the Office of Safety, FRA, by telephone, through the appropriate FRA regional office, immediately making available to FRA the consent form required by paragraph (c) of this section. FRA will then take appropriate measures to obtain the necessary samples.

(b) *Accidents covered.* Post-accident toxicological tests shall be conducted for—

(1) Any passenger, freight, or work train accident described in § 225.19(c) of this title ("Rail equipment accident") that involves one or more of the following:

(i) A fatality;

(ii) A reportable injury to an employee or other person, as defined in § 225.5 of this title;

(iii) Damage to railroad property of $150,000 or more; or

(iv) Release of hazardous materials, other than a release of a small quantity of product from the valves or fittings of a single tank car where—

(A) The tank remains upright;

(B) There is no damage to the tank; and

(C) The release does not occasion an evacuation.

(2) Any train incident that involves one or more of the following:

(i) A fatality; or

(ii) Loss of an arm, leg, or eye. However, no test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other conveyance at a rail/highway grade crossing or in the case of a train incident consisting solely of a fatality or injury to a trespasser.

(c) *Consent requirement.* (1) Each railroad shall require as a condition of employment in covered service that each of its employees consent to testing under this subpart, and each employee engaged in covered service after the effective date of this subpart shall be deemed to have so consented.

(2) In order to assure that employees are made aware of the requirements of this subpart and to provide a record of consent of the employee to tests under this subpart, each employee in covered service shall execute a consent form containing the statements contained in Appendix B to this part. The writing shall be witnessed by at least one person familiar with the identity of the employee and shall be retained for the duration of the employee's service with the railroad, or until a replacement form is executed, in an office of the railroad as close as practical to the territory where the employee is assigned.

(d) *Notification of results.* FRA notifies the railroad and the tested employee of the results of the toxicological analysis and permits the employee to respond in writing to the results of the test prior to preparing any final investigation report concerning the accident or incident. Results of the toxicological analysis and any response from the employee are also promptly made available to the National Transportation Safety Board on request.

(e) *Sample retained.* Each sample provided under this subpart is retained for not less than six months following the date of the accident or incident and may be made available to the National Transportation Safety Board (on request) or to a party in litigation upon service of appropriate compulsory process on the custodian of the sample at least ten (10) days prior to the return date of such process. It is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation unless a copy of the subpoena,

order or other process is contemporaneously served on the Chief Counsel, FRA, Washington, D.C.

(f) *Report.* If the railroad is unable, as a result of noncooperation of an employee or any other reason, to obtain a sample and cause it to be provided to FRA as required by this section, the railroad shall make a concise narrative report of the reason for such failure and any responsive action taken to the cause of such failure (if appropriate). This report shall be appended to the report of the accident/incident required to be submitted under part 225 of this subchapter. In any case where FRA has been provided telephonic notice of any problem in obtaining a sample (*e.g.*, in the case of a fatality or injury requiring medical attention), the report required by this paragraph shall make reference to the date and time of such notification and the FRA representative who received the notice.

(g) *Condition on employment in covered service; sanction.* (1) An employee who declines to affirm consent to testing by executing the form required by this section shall not be assigned to or continued in covered service until the employee agrees to provide such consent.

(2)(i) An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident specified in this section shall immediately be withdrawn from covered service for a period of at least six months following such accident or incident.

(ii) After withdrawing the employee from covered service under this paragraph, the railroad shall provide an opportunity for hearing before a carrier official other than the charging official. The hearing shall be convened within the period specified for post-suspension hearings in the applicable collective bargaining agreement. In the absence of an agreement provision, the employee may demand that the hearing be convened within 10 calendar days of suspension or, in the case of an em-

ployee who is unavailable due to injury, illness, or other sufficient cause, within 10 days of the date the charged employee becomes available for hearing. For purposes of this subpart, the only issue at such a hearing shall be whether the employee refused to submit to testing, having been requested to submit, under authority of this subpart, by a representtaive of the railroad or attending medical personnel.

§ 218.107 Pre-employment Drug screens.

(a) On or after [the effective date of this subpart], each applicant for a position with a railroad that involves the performance of covered service shall be tested for the presence of alcohol and drugs. The test shall be accomplished through analysis of a urine sample or other reliable method. Whenever feasible, the sample shall be obtained in connection with a pre-employment physical examination.

(b) An applicant shall be advised as soon as practical, but not less than 7 days prior to the examination, that the applicant will be required to provide a urine or other body fluid sample for testing and that the sample will be tested for the presence of alcohol and drugs. In the case of an applicant who declines to be tested and withdraws the application for employment, no record shall be maintained of the declination.

(c) The railroad shall cause the samples obtained under this section to be identified, preserved, and tested by a competent laboratory for the presence of drugs, including, at a minimum, the following substances: alcohol, opiates (narcotics), cocaine, barbiturates, amphetamines, cannabis, hallucinogens, and any other drug(s) identified by the carrier medical officer as in frequent use in the locality.

(d) If the first test of a sample is positive for any drug, the sample shall be tested a second time by another laboratory, or by another method, to confirm the finding.

(e) The railroad shall notify the applicant of the results of the test(s) and shall, in the case of a positive result, provide the applicant with an opportunity to explain the presence of the identified substance prior to taking any action on the application for employment.

(f)(1) Each railroad shall retain records of tests conducted under this section for at least 2 years and make them available to FRA for review. Such records need not reflect the identity of any applicant not employed in covered service.

(2) Not later than March 1 of each year the railroad shall report to FRA concerning pre-employment tests conducted in the previous calendar year. The report shall indicate the number of tests conducted and the number of those tests that were positive, inconclusive, and negative, respectively. With respect to positive tests, the report shall identify the substances detected (by generic name) and the number of tests with respect to which each such substance was detected. The report shall also contain a short narrative summary describing the current policy and practice of the railroad with respect to employment, and subsequent handling, of applicants whose tests were positive.

(g) An applicant who has refused to submit to pre-employment testing under this section shall not be employed in covered service during any period such refusal may continue.

(h) The requirements of this section shall not apply to any railroad that employs a total of not more than 15 employees who perform covered service.

§ 218.109 Authority to test for cause.

(a) *Grant.* A railroad subject to this subpart may, upon just cause, and consistent with the provisions of this section, require any covered employee, as a condition of employment in covered service, to cooperate in breath

testing, urine testing, or both, to determine compliance with § 218.103 of this subpart or a railroad rule implementing the requirements of § 218.103. This authority is limited to duty hours (including any period of overtime or emergency service). Each covered employee shall be deemed to have consent to such testing. The provisions of this section apply only where, and to the extent that, the test in question is conducted in reliance upon the authority conferred by this section.

(b) *Just cause.* (1) The following circumstances constitute just cause for testing an employee under this section:

(i) A supervisory employee of the railroad has a reasonable suspicion that the employee is currently impaired by alcohol or any drug, based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee;

(ii) The employee has been directly involved in an accident or incident reportable under Part 225 of this title; or

(iii) The employee has been directly involved in one of the following operating rule violations or errors:

(A) Occupancy of a block to which entry was not authorized;

(B) Failure to observe clearance limitations when setting out of rolling stock (on completion of a switching operation);

(C) Failure to protect a train as required by a rule consistent with § 218.37 of this part;

(D) Operation of on-track equipment at a speed at least 10 miles per hour greater than the maximum authorized speed prescribed by the railroad;

(E) Alignment of a switch in violation of a railroad rule or operation of a switch under a train or switching movement; or

(F) Violation of any other operating rule, timetable instruction, special instruction, general order, bulletin order, or other written directive of the kind which directly affects safe movement of a train, switching movement or lite engine in a way that could result in a train accident (including any such violation detected in an operational or efficiency test).

(2) Nothing in this paragraph shall authorize testing of an employee after the expiration of a 12-hour period from the time of the observations or other events described in this paragraph.

(c) *Limitation on number of tests.* (1) No employee shall be required to cooperate in more than three test procedures in any 12-month period, or more than two test procedures in any 30-day period under paragraph (b) of this section, except where a previous test of the employee during the previous 12 months was positive. Tests required by § 218.105 of this subpart shall not be counted toward these limitations.

(2) As used in this paragraph, a single "test procedure" may include the provision of both breath and urine samples. A single breath test procedure may include a follow-up test after a positive reading and may also include the provision of a breath sample for the purpose of preliminary screening. A urine test procedure may include the provision of not more than two samples from the same employee.

(3) If an employee is required to submit to a preliminary screening test the results of which are negative, the employee shall not be required to provide another breath sample during that duty tour.

(d) *Test safeguards.* (1) *Breath testing.* The following conditions apply to breath testing authorized by this section, other than tests the results of which are not used for disciplinary purposes:

(i) Testing devices shall be of evidential quality, as determined in accordance with standards or guidelines issued by the Department of Transportation, and shall be maintained and calibrated in accordance with the manufacturer's instructions;

(ii) Tests shall be conducted by a qualified operator in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature;

(iii) If an initial test is positive, the employee shall be tested again after the expiration of a period of not less than 20 minutes, in order to confirm that the test has properly measured the alcohol content of deep lung air; and

(iv) Any test result of less than .02 BAC shall be deemed a negative test.

(2) *Urine testing.* The following conditions apply to urine testing authorized by this section, other than tests the results of which are not used for disciplinary purposes;

(i) The sample(s) shall be collected at a place of reasonable privacy on the railroad (subject to the presence of one representative of the railroad of the same sex) or at an independent medical facility;

(ii) In the case of a sample obtained by a railroad representative, the sample shall be marked and sealed in the presence of the employee and the railroad shall maintain a controlled chain of custody of the sample and shall take reasonable precautions to maintain sample quality;

(iii) The sample(s) shall be analyzed by a reliable method and, if positive for a substance other than alcohol, shall be retested by a second laboratory or by another method; and

(iv) Any test result convertible to an estimated BAC below .02 shall be deemed a negative test for alcohol.

(3) Employee option.

(i) In any case where a breath test is intended for use in the disciplinary process and the result is positive, the employee shall be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by that facility or another independent laboratory. The railroad shall provide the required transportation to facilitate the blood test.

(ii) In any case where a urine test is intended for use in the disciplinary process, the employee shall also be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by that facility or another independent laboratory. This paragraph (d)(3)(ii) shall not apply in a case where the railorad utilizes a portable or other on-site urine test method and the result of the urine test is negative.

(e) *Presumption.* If an employee has tested positive for a material quantity of alcohol or a drug in a urine test and the employee was afforded and declined the opportunity to provide a blood sample, the railroad (or a board of arbitration) may presume from the presence of alcohol or the identified drug that the employee was impaired by that substance within the meaning of § 218.103 of this subpart.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C87-353R

AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
Plaintiff,

v.

ALASKA AIRLINES, INC.,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING JUDGMENT FOR DEFENDANT

[Filed Aug. 11, 1987]

THIS MATTER comes before the court on a motion by plaintiff Air Line Pilots Association, International, for preliminary injunction. Having reviewed the motion, together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

This case involves a challenge to rules issued by defendant Alaska Airlines, Inc. ("AA"), requiring all employees, including those represented by plaintiff Air Line Pilots Association, International ("ALPA"), to comply with a drug and alcohol testing program. Among other things, the program provides that all applicants for employment and all employees returning to work after an absence of more than sixty days must submit to a drug screen.

In addition, a drug screen or alcohol testing can be required "[w]hen an employee's job performance or behavior while on or off the job provides a reasonable basis to believe that the employee has a chemical dependency or abuse problem." AA System Regulations Section 2.450, p. 5. Thus, according to the new rules, a supervisor who suspects that an employee may be under the influence of drugs or alcohol must promptly remove the employee from service and arrange for testing. The employee cannot return to work until the results of the tests become available. If the results are negative, the employee is fully compensated for the time out of service. Any employee who tests positive on a drug screen and later returns to work under the new rules is thereafter subject to mandatory drug testing without prior notice.

When the rules were proposed in November of 1986, ALPA, as collective bargaining representative for AA pilots, requested that AA bargain with ALPA concerning the program. But AA refused and the new regulations became effective on December 8, 1986.

ALPA then filed a complaint in this court alleging that AA's unilateral promulgation of the new drug and alcohol policy is a violation of its collective bargaining obligation. ALPA now moves for a preliminary injunction barring AA from enforcing the new rules until the bargaining rights and obligations of the parties have been determined. AA responds that it has no duty to bargain concerning the rules, that an arbitration proceeding is the proper forum for the parties to discuss their differences, and that the court should deny ALPA's request for interim injunctive relief.

II. LEGAL ARGUMENT

The relationship between AA and ALPA is governed by the terms of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* Labor disputes under the RLA are divided into "major disputes," which involve the forma-

tion or alteration of collective bargaining agreements, and "minor disputes," which concern grievances arising out of an agreement or questions of contractual interpretation and which must be settled pursuant to the RLA's mandatory arbitration procedures. *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1944); *O'Donnell v. Wien Air Alaska*, 551 F.2d 1141, 1146-47 (9th Cir. 1977).

ALPA contends that the controversy over the new drug and alcohol testing program is a "major dispute," and that AA is thus required to bargain with ALPA about the proposed changes. *See* 45 U.S.C. § 152 of the RLA, which specifically forbids an employer to alter the working conditions of employees as embodied in collective bargaining agreements unless the provisions of § 156 regarding bargaining to change the terms of agreements are followed. ALPA further contends that AA should be enjoined from enforcing the new policy pending its compliance with § 156. Even if the dispute is characterized as "minor," ALPA asks the court to enjoin AA's enforcement of the program pending mandatory arbitration of ALPA's grievance covering the matter.[1] AA counters that the dispute is "minor" in nature and that ALPA is not entitled to an injunction because it has not satisfied the prerequisite of showing irreparable injury or that the balance of hardships tips in its favor.

In order to determine whether this dispute is major or minor, the court must decide whether AA's enforcement of the new policy is "expressly and arguably predicated on the terms of the [existing] agreement [between AA and ALPA], as illuminated by long-standing practices." *Id.* at 1147 (*quoting Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

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[1] Without conceding that the dispute is in fact minor, ALPA has taken the precaution of filing a grievance about the new policy. Affidavit of Dale Caley, Exhibit 1.

If so, the dispute is minor, and the court must then determine whether injunctive relief is appropriate. If not, the dispute is major and ALPA is entitled to have AA enjoined from enforcing the new policy until AA has fulfilled its bargaining obligation under the RLA.

AA argues that, since the mid-1970's, its internal rules have specifically banned any use of drugs by pilots as well as the consumption of alcohol on or prior to duty. Since at least 1947, the collective bargaining agreement has also allowed AA to require a pilot to undergo medical examinations at AA's expense. Section 23.C. of the agreement states as follows:

> C. Should the Company [AA] require a pilot to be examined, in addition to the prescribed FAA physical examinations, said examination shall be considered a Company physical examination and shall be at Company expense. The Company shall indicate to the pilot the reason(s) for the physical examination. . . .

AA contends that this language places no restrictions on these examinations, thus leaving AA complete discretion to determine when, how and why they shall take place.

ALPA responds that, far from arguably supporting AA's unilateral imposition of a new drug and alcohol testing program, the language of the collective bargaining agreement explicitly requires AA to bargain with ALPA concerning the proposed change. ALPA first contests AA's argument that it has unrestricted discretion to require a pilot to complete a medical examination by pointing to Section 23.A., which provides that "[t]he physical standards required of a pilot shall be the standards established and administered by the Federal Aviation Agency, [sic] including its waiver and exemption policy." ALPA stresses that the Federal Aviation Agency ("FAA") regulations governing the standards for medical certification of pilots do not contain any provisions

concerning testing for use of drugs or alcohol. 14 C.F.R. § 67.1 *et seq.* They only provide that, in order to receive a first-class medical certificate, an applicant must have no established medical history or clinical diagnosis of alcoholism or drug dependence.[2] *Id.* at § 67.13(d)(i)(c) and (d).

As further proof that the Federal Aviation Agency has not yet promulgated standards concerning testing for drug and alcohol use, ALPA asserts that in December of 1986, the FAA published an advance notice of proposed rulemaking concerning control of drug and alcohol use for personnel engaged in commercial and general aviation activities. 51 Fed. Reg. 44432; 52 Fed. Reg. 2547.

After pointing out the gaps in the existing FAA regulations, ALPA cites Section 23.B.2. of the collective bargaining agreement, which states:

> 2. In the event of change by the Federal Government in the method of medical certification or standards, [ALPA] may, notwithstanding the provisions of Section 31, "Duration" give thirty (30) days written notice pursuant to Section 6 of the Railway Labor Act, as amended, for the purpose of negotiating with respect to the provisions of this Section 23 of the Agreement.

ALPA contends that it is plain on the face of the agreement that ALPA's ability to require medical examinations is limited by the scope of existing FAA standards, which do not now provide for mandatory drug and alcohol test-

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[2] Alcoholism is defined as "a condition in which a person's intake of alcohol is great enough to damage physical health or personal or social functioning, or when alcohol has become a prerequisite to normal functioning. 14 C.F.R. § 67.13(d)(i)(c). Drug dependence is defined as "a condition in which a person is addicted to or dependent on drugs other than alcohol, tobacco or ordinary caffeine-containing beverages, as evidenced by habitual use or a clear sense of need for the drug." *Id.* § 67.13(d)(i)(d).

ing under the circumstances set forth in AA's new policy.

Having carefully reviewed ALPA's arguments, the court finds that it cannot agree with ALPA's conclusion. It is true that existing FAA regulations specifically provide for drug and alcohol testing only under certain narrow conditions. However, it is also clear that the FAA does prohibit crew members from operating aircraft while under the influence of alcohol or while using any drug that affects the person's faculties in any way contrary to safety. 14 C.F.R. § 91.11(a)(1)-(4). The collective bargaining agreement between ALPA and AA, Section 23.A and C, can be read to permit AA to require an examination, including a drug or alcohol test, in order to ascertain whether a pilot is complying with the FAA physical standards prohibiting crew members from acting under the influence of drugs or alcohol. Thus, the court concludes that the issue of testing under those circumstances constitutes a minor dispute.[3]

The court notes that AA rules have since at least 1976 barred the use of narcotics at any time by flight crew members; unsupervised use of narcotics is cause for immediate dismissal. Affidavit of Patrick L. Glenn, Exhibit A. Since at least 1977, AA rules have provided that "intoxication, consumption of alcohol or unauthorized drugs on or prior to duty by any flight crew member" and "use of narcotics or similar drugs" are major breaches of AA policy which may result in job termina-

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[3] The court recognizes that, as originally promulgated, the FAA regulations may not have specifically contemplated the use of urinalysis to detect the presence of drugs. However, it is not disputed that pilots have been subjected to routine urine tests for purposes of medical certification for many years. Thus, the method employed, if not the use to which it is now being put, is not novel and arguably falls within the provisions of the collective bargaining agreement.

tion, disciplinary suspension and/or long-term suspension of pass privileges. Affidavit of Dennis J. Hamel, p. 2 and Exhibit A, pp. 2, 4. The rule requiring employees to undergo a drug screen upon returning from an absence of more than sixty days has been in effect since July of 1985. Thus, the court concludes that AA's prohibition of off duty drug use has been to a large extent condoned by past practice, which in turn indicates that the AA's unilateral promulgation of new rules at most constitutes a minor dispute subject to arbitration.

A careful review of the precedent cited by the parties does not alter the court's conclusion that this case involves a minor dispute under the RLA. Unlike several of the cases cited by ALPA, the instant situation does not involve a serious departure from prior practice like random testing or regulation of off duty drug use where no such rule had existed before. *Compare Transport Workers Union v. SEPTA*, No. 87-0389 (E.D. Penn. Feb. 9, 1987); *International Brotherhood of Teamsters v. Southwest Airlines Company*, No. CA-3-86-3103-R (N.D. Tex. Jan. 6, 1987); and *Brotherhood of Maintenance of Way Employees v. Chicago and North Western Transportation Co.*, Civil Case No. 4-86-575 (D. Minn. Oct. 16, 1986).

Under the circumstances of this case, the court finds far more persuasive the reasoning in *Railway Labor Executives' Association v. Norfolk and Western Railway Co.*, No. 86 C 2064 (N.D. Ill. Feb. 2, 1987); and *International Association of Machinists and Aerospace Workers v. Trans World Airlines*, Civil Action No. 87-0403 (D.D.C. Feb. 20, 1987). In both of those cases, it was held that the drug and alcohol testing programs proposed by the employers did not constitute unilateral changes in working conditions, but rather the imposition of rules arguably justified by the existing contract and past practice.

Since only a minor dispute is involved, ALPA and AA must resolve their differences through arbitration. The

question remains whether ALPA is entitled to a preliminary injunction pending the completion of the arbitration process. In order to prove such entitlement, ALPA must show "either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and that the balance of hardships tips sharply in its favor." *Zepeda v. United States Immigration and Naturalization Service*, 753 F.2d 719, 727 (9th Cir. 1983).

Regarding ALPA's showing on the merits, the court finds that an arbitrator might well conclude that some changes in AA's program as urged by ALPA would be in order. Nevertheless, the court does not find any substantial support for ALPA's position that the program conflicts with the plain language of the collective bargaining agreement. On the issue of irreparable injury to ALPA's members, the court acknowledges the intrusion on their right to privacy and the potential harm to reputation which the pilots might suffer as a result of AA's drug and alcohol testing program.[4] But the court concludes that these possibilities do not constitute a sufficiently serious threat of hardship to outweigh the potential hardship to AA if it is enjoined from implementing its new policy and thereby handicapped in its attempt to ensure that flight crew members are not under the influence of drugs or alcohol.

For the reasons stated above, plaintiff ALPA's motion for preliminary injunction is DENIED. Given that no other issues remain to be resolved in the case, the court also grants judgment for defendant AA.

IT IS SO ORDERED.

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[4] On the other hand, AA assures the court that the results of any tests performed under the new policy will remain strictly confidential.

The Clerk of the Court is directed to send copies of this Order to counsel of record.

DATED at Seattle, Washington this 10th day of August, 1986.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Jan. 9, 1987]

Civil Action No. CA3-86-3103-R

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA—AIRLINE DIVISION and TEAMSTERS LOCAL 19

vs.

SOUTHWEST AIRLINES COMPANY

ORDER GRANTING PRELIMINARY INJUNCTION AND DENYING DEFENDANT'S MOTION TO DISMISS

On January 6, 1987, came on for hearing Plaintiffs' Application for Preliminary Injunction and Defendants' Motion to Dismiss and the Court having considered the evidence, briefs and arguments of counsel, enters the following Order in conformance with the Findings of Fact and Conclusions of Law announced at the conclusion of such hearing.

Plaintiffs' Application for Preliminary Injunction is GRANTED upon the Court's conclusion that with respect to employees represented by Plaintiffs, the dispute concerning implementation of the Defendant's drug and alcohol testing policy constitutes a "major" dispute as does implementation of each identifiable element of the policy.

The Application is likewise GRANTED upon the additional alternative conclusion that even if the disputes are "minor", employees represented by Plaintiffs will be subjected to the likelihood of irreparable harm if the policy is implemented and that the balancing of the equities favors an injunction maintaining the status quo pending resolution under the grievance/arbitration procedures of the parties' labor contract. Accordingly, pending both appeal and final disposition, Defendant Southwest Airlines Company, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby enjoined from enforcing the drug and alcohol testing policy or any element of it (as set out in Defendant's Exhibit 8 and 9 which are attached and incorporated in this order) with respect to employees represented by Plaintiffs. However, nothing in this Order prohibits Defendant from enforcement of its present rules G(4) and (5). On the same basis Defendant's Motion to Dismiss is DENIED.

Defendant by agreement has waived bond to secure this injunctive order.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

* * * *

THE COURT: As I indicated to you in the conference last week, I had intended to rule on this matter orally. And these remarks that I'm going to make will constitute my Findings of Fact and Conclusions of Law.

I suspect that the 5th Circuit will resolve the matter and I think I'll do you a service by getting you to the 5th Circuit as quickly as possible so I'll do just that.

My remarks will cover first the major or minor legal issue; secondly, the management rights argument, and then third the alternative argument that even if this is a minor dispute injunctive relief should be granted.

This is obviously a suit for injunctive relief to prevent the Defendant Southwest Airlines from putting into effect unilaterally a program for detecting drug and alcohol use among employees.

In general under the Railway Labor Act, if a proposed practice by a carrier is a clear departure from the collective bargaining agreement, then a dispute over the practice is treated as a major dispute under the act and the carrier may not proceed without first negotiating with the employees' representative. However, if the practice is arguably justified by the collective bargaining agreement, including self past practices of the parties under the agreement, then a dispute is called a minor one and the carrier may proceed unilaterally, subject to arbitration process before the National Railroad Adjustment Board.

I have concluded, based on the evidence and on the arguments and the cases, that what is presented to me is a major dispute. The terms major and minor are not in the act which speaks of changes and agreements effecting rates of pay, rules or working conditions as one kind of dispute; and then also it speaks of disputes growing out of grievances or out of the interpretation or application

of agreements concerning rates of pay, rules of working conditions as another type of dispute. And the language and the distinction between major and minor disputes is drawn from that language and was first stated in the *Elgin* case, 325 U.S. 711, 1945 Supreme Court decision.

The basic facts are undisputed. Before November of 1986 Southwest Airlines had in effect 2 work rules dealing with drugs and alcohol, rules G(4) and (5). (4) states that "Reporting for or carrying on work while showing any signs of the use of intoxicants, or knowingly permitting another employee to do so, is strictly prohibited." (5) provides that "Possession of or drinking of any intoxicant or illegal possession or use of illegal or dangerous drugs on company premises, or while in uniform, and/or habitual use of intoxicants or use of illegal or dangerous drugs on or off duty will not be tolerated."

The rule—neither the rules nor the contract make any provision for drug or alcohol testing. In the 4-year period during which the Teamsters have represented the bargaining unit effected here, mechanics and related employees, none of those employees have been subjected to any drug or alcohol testing.

In early November of 1986 Southwest notified the Plaintiffs of its intention to unilaterally impose a mandatory drug and alcohol testing program. By responding to a letter that the Teamsters stated its concern for drug and alcohol abuse and requested Southwest to negotiate with it concerning the terms of a drug testing program. By reply letter Southwest stated its refusal to negotiate, its intention to proceed to implement the drug and alcohol testing program. After meeting with the 5 unions, who represent Southwest employees, and making modifications in the program initially proposed, the company did implement the drug testing program.

Defendant's Exhibits 8 and 9 at this hearing do contain the substance of the program. The union has con-

tinued to request negotiation and Southwest has continued to offer to discuss the terms of the program but not to negotiate. The program became effective January 1, 1987, although to date under the evidence that I've heard, no employee has been tested or had been disciplined under this program.

Three cases have been cited to me dealing with the implementation of drug and alcohol testing programs under the Railway Labor Act. Each of these cases involves the Burlington Northern Railroad. They are as follows: *Brotherhood of Maintenance Employees vs. Burlington Northern*, 802 F.2d 816, 8th Circuit case, 1986. I'll refer to that as *Burlington I*. *Brotherhood of Locomotive Engineers vs. Burlington Northern*, 620 F.2d 163, District Court Montana, 1985. I will refer to that as *Burlington II*; finally *Brotherhood of Locomotive Engineers vs. Burlington Northern*, 120 Labor Relations Reporter 3054, District Court Montana, 1985, and I'll refer to that as *Burlington III*. It's the same Court in Montana. And *Burlington II* and *Burlington III* are pending presently before the 9th Circuit and a decision I have been advised is expected momentarily.

On *Burlington I*, the 8th Circuit case, there was a rule, also rule G as in this case which prohibited employees from using, possessing or being under the influence of alcohol or other drugs while at work or while they were subject to be called to duty. However, nothing in the collective bargaining agreement referred in anyway to rule G or to any enforcement or investigation method.

According to the 8th Circuit, however, the parties had acquiesced in certain detection and investigation methods over the years, primarily were sensory observations, both seeing whether the employees appeared to be under the influence of alcohol, also smelling the breath to see if employees smelled of alcohol.

Initially the Railroad used only the visual observations and smelling observations. However, at one point they

began to permit the employees to use drug testing, whether breathalyzer, blood alcohol or urine analysis as defensive means to clear themselves, the employees, of accusations that they were at work while they were drunk.

In addition, during routine physical examinations required of all employees, there was urinalysis conducted. Urine tests were taken, although no drug screening was done. There was no at large or random screening or random searches. Under the past practices there had to be a particularized suspicion of a given individual, not general testing or a dragnet.

The 8th Circuit concluded that the contract did not permit the implementation of new drug testing however, that the parties had acquiesced in certain established practices and that any minor departure from these established practices would not constitute a major dispute under the labor act.

The 8th Circuit concluded that there were only minor changes involved in *Burlington I*. That in addition to voluntary use of drug tests, the company implemented mandatory testing. That was to confirm the suspicions that a particular individual, not all employees in general, had violated the drug-alcohol rule.

The 8th Circuit also felt is was a minor change to test all the members of a crew after an accident but that was to occur under the facts only after an accident happened and only when an individual's responsibility was not clear, and the Court noted that under the procedures proposed by the Burlington railroad, that not all members of the crew would be tested at random if it was obvious that one was responsible.

Finally as to the adding of a drug test to the routine physicals that were given, the 8th Circuit concluded that adding the drug screen test to the routine urine anal-

ysis [sic] phase of the established medical examination, was a minor dispute.

The decision on the urine analysis test was 2 to 1 decision. The other decisions where minor disputes were involved were unanimous.

Burlington II, the first Montana decision, the same factual background, no contractual provision regarding testing, past practice with visual surveillance by train masters or road foreman but not random dragnet testing, only a particular employee believed to be under the influence of alcohol or drugs. In that instance, the District Judge found that the new drug tests, which were to include random searching by dogs of persons or personal effects, was not arguably justified by the terms of the agreement and concluded that was a major dispute.

Burlington III, also the Montana District Court, concerned the addition of urine analysis as drug test in addition to the visual observations. The District Judge approved that as being a minor dispute, not a major one, and specifically found, however, that the complaint filed by the union did not allege that urinalysis was going to be done on a completely random basis but rather only upon those employees who were believed to have been involved in a violation of the drug-alcohol rule. Under those circumstances the District Judge found that the additional drug testing program was minor.

Now, applying the *Burlington* principles to the present case, there are two provisions in the contract concerning drug testing. Under the evidence I specifically find that there was no established past practice as there was in *Burlington*. There was some one specific incident involving Mr. Lopez in 1984. That was a situation where he was observed to be intoxicated on the job. He was offered a chance to take a test but refused. The company did not discipline him for refusing to take the test. He was disciplined for being drunk on the company premises.

The only other evidence concerned Mr. Moran who was —one who had a horrible absentee and accident record and he was given a chance to go voluntarily to an alcohol treatment program. He received probation but that was for repeated absences and accidents and was not a probation for alcohol problems or violation of the drug-alcohol rule.

So in the context of the *Burlington* cases I would find that there is no established past practice, there was a rule prohibiting the coming to work by someone who was under the influence of alcohol, or being at work under the influence of alcohol. That's G(4). There was also G(5) which was the drugs or alcohol rule; possession, selling or use on the premises or habitual use and the other elements in G(5).

In contrast to that, what I have in this case is a substantial change. It's not merely an additional urine analysis test as in *Burlington I* or *Burlington III*. It, of course, does not involve the use of a dog as in *Burlington II*. However, I have a very comprehensive rule which forbids possession, use, appearance at work under the—I'm sorry, I have a comprehensive program for monitoring, testing and punishing employees and following up on detected drug-alcohol use. And I would specifically find that the program does constitute a major dispute in its implementation and that the union would be entitled to the injunction it seeks under the Railway Labor Act.

Secondly, the management rights provision, the contract does contain this specific provision: "Employees covered by the agreement shall be governed by all company rules, regulations and orders previously or hereafter issued by proper authority of the company which are not in conflict with the terms and conditions of this agreement and which have been made available to the employees prior to becoming effective."

Defendant Southwest argues that unlike the 3 *Burlington* cases the agreement in this case gave management the prerogative to issue rules, regulations and orders during the term of the collective bargaining agreement.

I would reject the argument based on the management rights provision. In this regard I also rely on *Burlington II*, the Montana District Judge's decision, and in that case there was an argument by the railroad that it was simply asserting its management rights in implementing the additional drug testing in that case, which again was the use of the dog and also the additional urine analysis test. They claim the right to take that action as a matter of management prerogative as long as it didn't conflict with the terms of the agreement, which it did not in that case.

The District Judge in Montana rejected that decision noting that the absence of a—of a particular method of enforcement of drug testing or detection does not necessarily establish that that could be used, but rather that the conspicuous absence may reflect the fact that a particular method tolerable to both sides has existed over time and then made the finding I've noted earlier that the parties had acquiesced in the visual surveillance method by which the railroad could detect violations.

The evidence in this case fortunately is much less sketchy than in *Burlington Northern*. That's because the problem is not as acute as the alcohol problem appeared to be at *Burlington*. And again I have specific evidence of only the Lopez matter where discipline was involved and Moran where the employee was put on probation for absences.

In concluding that this was a major dispute and in rejecting the management rights argument, I would also note that in the Lopez situation the testimony before me was that the company did not consider terminating Lopez for failing to take the drug test and that indeed, that it

was the right of the individual Lopez to refuse to take the test if he so desired.

I would also note that the changes in these new rules are not covered in a number of respects by the existing rules. Again the existing rules covered in G(4), coming to work with the appearance of being intoxicated and in G(5), possession, using or selling either drugs or alcohol on the premises, or while in uniform or habitual use. In contrast the drug-alcohol policy statement that was implemented on January 1 goes much beyond those 2 rules. For example, the employees may be terminated for coming to work if there is any detectible level of drugs in the system. A specific alcohol level is given, .05 percent, which was not present in the prior rules.

New rules also cover prescription drugs and over-the-counter medication which would not be covered by the rules G(4) and G(5) unless you gave a very unusual definition to illegal or dangerous drugs in the language in G(5).

The new program also covers possession on the premises of drug paraphernalia, literature promoting illegal drug or substance use.

Specifically in paragraph 4 of the program, there are a number of charges, without repeating all of them, that while it may be that paragraph 3 wherever management has a reasonable suspicion to believe the policy has been violated, would be consistent with past practice. None of the others would be consistent with past practices as the evidence establishes.

Then finally the remaining argument—I'm sorry, there is a remaining alternative argument on the major-minor issue, and the union does argue that even if Southwest had the right to impose additional drug testing under rules G(4) and G(5) and a management rights clause that the provisions of the rules involved in the January

1, 1987 program are themselves major disputes. I would accept the arguments made by the union in that regard. I'll only indicate a couple of the major changes. One is paragraph IV(A)(1) which is testing after car or aircraft damage accident; IV(A)(2), which is testing after on duty accident or on-the-job injury; IV(A)(4) which concerns the physical for a position for which the employees have applied, being required to take drug and alcohol tests if they qualify for that; IV(B) employees release form. Those are simply examples. Others are cited in the union brief from pages 9 through 13.

The final finding and conclusion, which I will make, concerns the alternative argument and that's even if I am incorrect and if this were a minor dispute, as Southwest argues, then injunctive relief would be appropriate under traditional principles. Here if a suit is found to be minor a District Court does have discretion to issue an injunction to maintain status quo during pendency of arbitration, if the relief is necessary in order to preserve the integrity and jurisdiction of the arbitration proceeding or to prevent irreparable harm that would render any subsequent arbitration decision meaningless.

Southwest argues that there would be no irreparable harm because it is willing to and will stipulate that the adoption of the drug-alcohol policy statements is within the arbitration procedure, and that if an employee were disciplined under this drug-alcohol policy statement, that the discharge of an employee, if determined to be wrongful, could be adequately remedied by reinstatement of employment with full back pay and restoration of all benefits and no loss of seniority.

However, I would find under the evidence presented that there is an additional element of irreparable harm besides the economic harm that could be rectified by arbitration. And that would be when an employee is accused of violating the drug-alcohol policy, and that could

occur either in a situation like Lopez, it could occur in a situation after an accident, when drug testing is determined to be required by Southwest under the drug-alcohol policy statement. It could also occur when an individual refused to take a drug test in accordance with the alcohol policy statement.

Testimony indicates that the bargaining unit members are licensed, that having an accusation made of a violation of a drug-alcohol policy, even if an employee is reinstated may be difficult, if not impossible, to erase. Also it may have some direct impact upon the ability of the employees in the bargaining unit to find jobs with other companies besides Southwest either if they refuse to take the test and then are trying to find another job to mitigate damages or if after arbitration and reinstatement they should leave and then go to—attempt to go to another company to work.

The question, without question to me, is a close one, whether it's major or minor dispute being the major issue. And basically I have concluded that I have a substantially different situation presented to me by the very comprehensive drug-alcohol policy statement than was present in any one of the Burlington cases.

I will deny the Motion to Dismiss which was filed by Southwest Airlines.

I will grant the Temporary Injunction sought by the Teamsters, and I will continue that injunction in effect pending the appeal, which I hope gets a quick resolution on appeal.

The comments I think will tell the 5th Circuit why I did what I've done so that you will be able to take these comments as the decision and go forward with the appeal promptly.

None of the comments that I have made are intended to disparage in any respect the drug-alcohol policy state-

ment. Indeed it appears to be a very reasonable effort to meet a serious problem. And although there have not been any accidents to bring into question the safety record of Southwest Airlines, there is no doubt that Southwest is to be commended for attempting to meet the problem. And as I indicated in some of the questions, I see it almost every Friday afternoon when I'm sentencing in cocaine and amphetamine cases and it is a serious problem. And by the same token, I don't think the union has taken a position that the—that this is not a necessary step and that they're simply saying that negotiations should take place.

And finally none of these comments would keep the parties from getting together and settling the case if they wanted to do so. I'm not even encouraging an appeal.

As to the request by the union that the employees be notified, I don't think that's really necessary at this point. I think that all that needs to be done is just to enjoin the enforcement of those policies pending the dispossession of matter on the appeal and I'm primarily concerned with there not being any discipline. I think if they just remain in place, but not enforced pending the resolution of this on appeal. And I don't know if you plan to ask the 5th Circuit to stay but it's conceivable they may grant a stay.

Finally, as to the alternative relief I would grant the alternative relief in the form which you requested, which would be simply an injunction pending the disposition of this by the arbitrator.

Have I forgotten anything?

MR. GILLESPIE: We would ask that bond be waived in terms of this injunction. There is no showing of likely harm to the company if the injunction is granted.

THE COURT: Mr. Harris, you want to respond now or you can wait if you want the time to think about that.

MR. HARRIS: I think we would like to have an opportunity to think about that. I think we can all think of an extreme circumstance where the damages would be immeasurable, God forbid but—

THE COURT: Yes. Well, I obviously am not rendering any injunction to keep Southwest from enforcing the drug-alcohol program as exists under G(4) and (5) and I see plenty of flexibility for enforcement of that policy.

Why don't you—you need to prepare the Judgment for me, the Temporary Injunction, and need to let Mr. Harris see it to see if he has any wording changes that you all could work out in advance. If you all do have a dispute just submit them informally to me by letter and I'll resolve those and get it issued quickly. I would like to get it done very promptly so that you can go on your appeal just as quickly as possible. Can we get that done by Friday of this week?

MR. HARRIS: Certainly.

MR. GILLESPIE: Certainly.

THE COURT: I do appreciate the expeditious manner in which both sides put on the case. The briefs were excellent. I just wish you had some airline cases instead of Burlington Railroad cases.

We will stand adjourned.

Supreme Court, U.S.
FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

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No. 87-1631

In The
Supreme Court of the United States

October Term, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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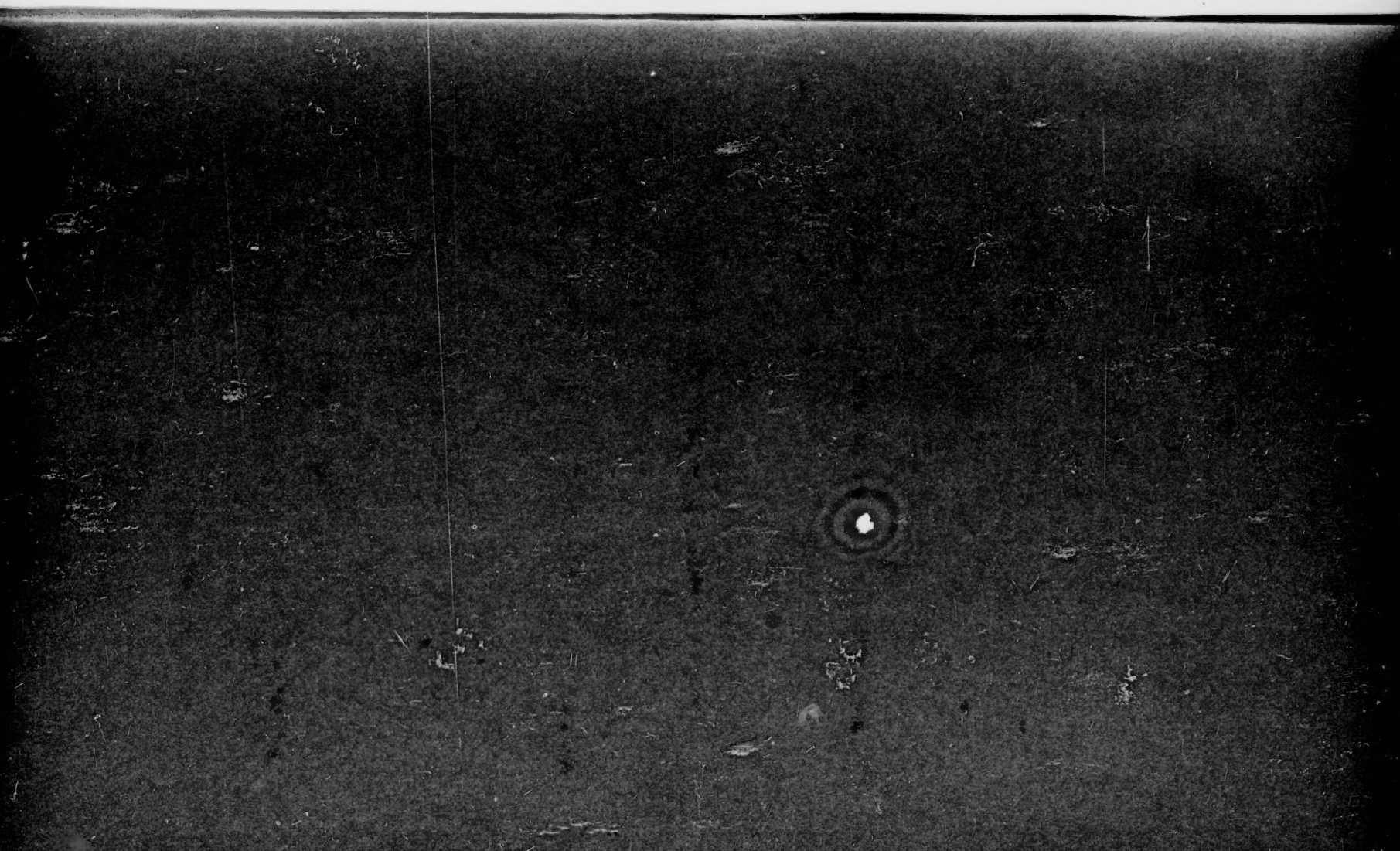

QUESTION PRESENTED

Whether the court of appeals correctly held that a railroad violates the major dispute provisions of the Railway Labor Act by unilaterally instituting a program of mandatory body fluid drug and alcohol testing of railroad employees who may have been members of a crew involved in certain accidents, incidents or operating rule violations, when the bargaining agreement is silent on the subject, the carrier and craft representative are negotiating upon a program for alcohol and drug prevention accompanied by an employee assistance program, and the railroad has a long established practice of particularized suspicion, rather than body fluid testing, for detection and enforcement of the rule against drug and alcohol impairment.

PARTIES BELOW

Respondent Brotherhood of Locomotive Engineers is the bargaining representative for the craft of locomotive engineers employed by the petitioner Burlington Northern Railroad Company.

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No. 87-1631

In The

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BURLINGTON NORTHERN RAILROAD COMPANY,

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Since its founding in 1863, the preamble to the constitution of the respondent Brotherhood of Locomotive Engineers ("BLE") has stated that the organization's cardinal principles are "sobriety, truth, justice and morality." In accordance with its charter, BLE has been in the forefront in negotiating, and attempting to negotiate, agreements with rail carriers to reduce the incidents of alcohol abuse and drug use. Accordingly, BLE has attempted to and been successful in negotiating Operation

Red Block, peer referral and bypass agreements and employee assistance programs with many leading railroads, like Union Pacific and CSX Transportation. As a result of BLE's leadership in this area, CSX, BLE and the United Transportation Union, which also has a well developed negotiating program on the subject, entered into a drug testing program formulated in a medical mode, which they styled "a model for the railroad industry."[1] Notwithstanding the fact that the experts in this area unanimously agree that any effective program for reduction of drug and alcohol abuse must have collaboration, employee participation, education, rehabilitation, and fair, firm enforcement procedures as components,[2] a few railroads, like petitioner Burlington Northern Railroad Company ("BN"), refuse to negotiate upon or develop a comprehensive, cooperative, fair and effec-

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1 "CSX, Labor Ink Drug Test Pact," *Journal of Commerce*, August 7, 1987, p. 1A.

2 Manello, *Prevalence, Costs, and Handling of Drinking Problems on Seven Railroads*, Federal Railroad Administration, Technical Report, Contract No. DOT-TSC-1375 (1979), concluded that labor should be a participant in planning these programs, serving on councils, and have specific responsibilities in the identification of employees who violate the rules. See also excerpts from testimony of Dr. Robert J. Pandina, expert witness for a regional transit authority, in *Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority*, 678 F. Supp. 543 (E.D. Pa. 1988), *appeal docketed*, No. 88-1160, etc. (3rd Cir. Mar. 9, 1988), on February 5 and 6, 1987 and September 21, 1987, which are contained in Respondent's Appendix hereto at pages 1a-6a (hereinafter "Resp. App."). For instance, Dr. Pandina testified "absolutely" in response to the question as to whether "one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management," and also agreed that negotiated programs are "most desirable." Resp. App. at 4a.

tive program. Rather, BN imposed its solution upon an employee relations problem, which policy includes mandatory drug testing that has ramifications upon the livelihood of all railroad employees, even employees who are innocent bystanders in the crew.[3]

Through the decades, locomotive engineers and other railroad employees have been required to comply with "Rule G," which forbids reporting to work under the influence of and on-the-job use or possession of alcohol and drugs.[4] The method by which Rule G violations are to be

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[3] BN concedes that compulsory urinalysis takes place under its program for minor human-factor incidents, such as "derailments in yard or industry switching, failures to respond to signals, running through switches or derailments, and failure to secure." Pet. at 7 n. 12. As the dissenting opinion below noted, unless "responsibility is clearly identified" in even these minor incidents, the entire crew is subjected to compulsory urine testing and "[a]n employee who refuses to submit to a blood or urine test is subject to discipline for insubordination." Appendix to Petition at 16a, 17a (hereinafter "Pet. App."); see also C. J. Bryan Memo., Pet. App. 99a. Moreover, "[t]he literature on drug testing is replete with references to the unreliability of results. See *Testing for Drug Use in the American Workplace: A Symposium*, 11 *Nova L. Rev.* (1987) *passim*. Requiring individualized suspicion would help to alleviate the harsh consequences of exclusive reliance on test results." *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, at 589 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988). In short, a person only indirectly involved in a minor human-factor incident may end up fighting to retain his employment by reason of a false positive urine test required by BN's unilaterally imposed compulsory test.

[4] On BN, Rule G reads as follows:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana or

(Continued on following page)

detected is not set forth in any collective bargaining agreement between the parties.[5] Rather, through decades of past practice, a mutually accepted method of detection and enforcement evolved, in which employees exhibiting outward manifestations of a drugged or intoxicated state, such as lack of coordination, slurred speech, alcoholic breath, red eyes or dilated pupils, or other visual evidences of unusual behavior associated with drug or alcohol use, were charged with Rule G violations. Tr. I at 27, 154; Tr. II at 17-18.

BLE has increased its efforts in recent years to foster a drug and alcohol free working environment through collectively bargained prevention programs which are based on equitable, humane principles, but are designed to efficiently and effectively treat with the problem. Tr. I at 29.

BLE's efforts to establish a cooperative program on BN began in October 1983. *Id.*, 31. BN repelled these early efforts, but the BLE subsequently submitted formal negotiating proposals in a letter dated April 23, 1984. *Id.* At a meeting held on May 10, 1984 to discuss BLE's proposals, BN demanded that random testing be part of any

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(Continued from previous page)

other controlled substances or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Pet. App. at 74a-75a.

5 Transcript of district court hearing held November 13, 1984 at 26-27 (hereinafter "Tr. I"). The references to the transcript of the district court hearing of March 21, 1985 will be referred to as "Tr. II".

agreement reached by the parties. That mandate eventually led to a breakup of the negotiations. *Id.* at 33-34, 137.

Shortly thereafter, BN unilaterally promulgated a sniffer dog search and surveillance program in which employees were subjected to random sniffer dog searches. *Id.* at 28. The parties met on several occasions to discuss BLE's objections to the use of sniffer dogs and BLE's proposed prevention programs.[6] *Id.* at 45-46, 55-57, 60. By demand of its membership, BLE circulated a strike ballot which resulted in an overwhelming vote in favor of a peaceful withdrawal from service. *Id.*, 57-59. Though BLE returned to the bargaining table, BN remained steadfast in insisting on the use of sniffer dogs. *Id.*, 60-62, 156-57.

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[6] On April 5, 1984, after BLE had submitted its proposals to BN, the Federal Railroad Administration ("FRA") issued a notice of proposed rulemaking for the control of alcohol and drug use in railroad operations. 49 Fed. Reg. 24,252. The FRA rules, as finally adopted on August 2, 1985, 50 Fed. Reg. 31508, required toxilogical testing of employees following major accidents and authorized railroads within various limitations to require employees to submit to breath and urine tests as a matter of course following specified operating rule violations and incidental human errors. The railroads sought this authority from the FRA, because they contended that under existing practices in the industry, as affirmed by the First Division of the National Railroad Adjustment Board in *Brotherhood of Locomotive Engineers v. Southern Pacific Transportation Co.*, Award No. 23334, 79 L.A.B. Arb. 618 (June 25, 1982), and by reason of the major dispute provisions contained in the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, they lacked authority to unilaterally institute a program requiring employees to submit to testing for operating rule violations and human factor incidents. 49 Fed. Reg. 24,253. The FRA rules were invalidated for Fourth Amendment reasons in *Railway Labor Executives' Ass'n v. Burnley, supra*, 839 F.2d 575.

On August 31, 1984, BLE challenged BN's unilaterally promulgated sniffer dog search policy in the United States District Court for the District of Montana. On October 5, 1984, the district court issued a preliminary injunction against BN's use of sniffer dogs.[7] But this did not stop BN's unilaterally developed and administered drug and alcohol testing program.

On November 5, 1984, BN, through its senior vice-president of operations, Charles J. Bryan, issued a policy directive to management officials requiring blood and urine tests in certain circumstances. Pet. App. 16a. Taking a cue from the FRA's proposed rules, this policy not only required compulsory testing after accidents but also after, among other things, minor incidents and operating rule violations. Pet. App. 99a. Under this policy, an employee, who is a crew member in which an operating violation or human-factor incident occurs, is subject to a urinalysis test as a condition of employment even though there is no reason to suspect the employee is under the influence of any prohibited substance. *Id.*

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[7] On July 31, 1985, the district court found that the sniffer dog search and surveillance program was not "arguably justified" by the agreement and past practices between the parties. The court held the dispute to be a "major" one, which required BN to exhaust the notice and bargaining provisions of the Railway Labor Act, and granted a permanent injunction. *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 620 F. Supp. 163 (D. Mont. 1985), *aff'd*, 838 F.2d 1102 (9th Cir. 1988). This decision was unanimously affirmed by the same panel of the court of appeals on the same day as the opinions were issued in this case, 838 F.2d 1087, and in *Railway Labor Executives' Ass'n v. Burnley, supra*. The opinion of the Ninth Circuit in the sniffer dog case is reproduced in Resp. App. at 6a-35a. The concurring opinion of the appeals court amplifies upon the thought process set forth in the majority opinion in the case at bar.

Contrary to the implication advanced by petitioner (Petition 7, 8), the policy was not an adjunct or extension of a program already applied to locomotive engineers represented by BLE. Instead, the evidence presented at trial showed it to be a new program. Among other things, the evidence showed that BN officials admitted in various forums that "[i]t is a new policy" and that "[i]t went into effect approximately the last week of November [1984]." Pl. Trial Exs. 17 at 13, 19 at 11. Moreover, a BN vice-president in the Twin Cities Region wrote in "On Track," a BN employee newsletter:

> This Region has had a urinalysis policy in effect since November of 1984.
>
> Since the program started ten employees from our Region have been asked to provide samples. None of these tested positive, and accordingly, no action was taken.

Pl. Trial Ex. 20.

Prior to November 1984, the evidence showed, toxicological tests were not used for purposes of detection or enforcement purposes, but were offered the employee desiring to take a test for purposes of refutation in any subsequent Rule G violation investigation. *E.g.*, Tr. II at 21-22; Pl. Trial Ex. 28 at 4, Pl. Trial Ex. 29 at 8-9. An employee declining this opportunity to submit to body fluid tests was never disciplined for refusing to take the test. Pl. Trial Ex. 22. Under the unilaterally established program, he would be disciplined or discharged for insubordination. Tr. II at 44-45; Pl. Trial Ex. 22.

In December 1984, BLE notified BN of its objections to the body fluid testing inaugurated in the last week of November. Pet. App. at 17a. BLE then moved to amend

its complaint to include this mandatory blood or urine testing, which motion the district court denied. *Id.* On January 7, 1985, BN filed a notice of intent to submit to arbitration the issue of whether mandatory testing was permitted under the bargaining agreement between BLE and BN. BN subsequently filed a submission with the National Railroad Adjustment Board.[8]

On February 14, 1985, BLE filed a complaint seeking declaratory and injunctive relief against the compulsory drug and alcohol testing program inaugurated in November 1984. BLE moved for a preliminary injunction on March 7, 1985. BN then filed a motion to dismiss and alleged that the Adjustment Board had exclusive subject matter jurisdiction over the matter because it was a "minor dispute" under the Railway Labor Act. An evidentiary hearing was held on March 21, 1985, and the district court treated BN's motion as one for summary judgment. Pet. App. 34a, n.1.

On July 31, 1985, the trial court granted BN's motion for summary judgment. In the course of his opinion, the trial judge stated:

> The BN's random use of urinalysis to detect violations would present a "major" dispute subject to the status quo provisions of 45 U.S.C. § 156. The subjection of an employee to a urinalyses (sic) on a

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[8] The case was docketed as NRAB Case No. B-1812. Although BLE objected to the jurisdiction of the First Division of the Adjustment Board, it filed an answering submission on September 5, 1985. The case was argued on February 25, 1987, but no decision has been entered or is presently anticipated by the arbitrator.

> random basis is not "arguably" justified by the terms of the implied agreement extant between the parties.

Pet. App. 35a.

Canvassing the factual record, the district court said:

> The question of whether the urinalyses practice is "arguably justified" by the implied agreement, regarding Rule G, found to exist between the Brotherhood and the BN in *BLE I* is not as clear cut as the question was with respect to the random use of drug detection dogs.

Id.

Based upon his view of the facts, the trial judge found that the established practices between the parties reaching "an implied contractual status" only required "the existence of a modicum of evidence that a particular employee was operating under the influence of a prohibited substance, before a supervisor could conduct further investigation." *Id.* Notwithstanding that prior to November 1984 the enforcement of Rule G was triggered as to locomotive engineers only by outward manifestations of drug or alcohol use, *i.e.*, probable cause, not minor incidents or inconsequential rule violations[9], or even accidents, and notwithstanding undisputed testimony that the triggering of Rule G did not lead to mandatory body fluid testing with any positive test results—even those results not establishing impairment—being used as the basis for auto-

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[9] At the March 21, 1985 hearing, BLE presented evidence of over 700 incidents that occur with relative frequency, such as derailments, side swipes, and switch run throughs, and that prior to BN's new mandatory blood and urine testing policy had not been considered cause to justify an alleged claim of Rule G violation or to require body fluid testing. Pl. Trial Ex. 21; Tr. II at 22.

matic discharge, the court concluded "the urinalyses practice challenged by the Brotherhood is 'arguably justified' under the terms of the agreement extant between the Brotherhood and the BN." *Id.* Based upon its view of the facts, the district court held that it lacked subject matter jurisdiction because the dispute was minor. *Id.*

In a decision filed on February 11, 1988, the Court of Appeals for the Ninth Circuit reversed in a divided opinion. At the outset, the majority opinion set forth the traditional standards for determining whether a dispute is major or minor under the Railway Labor Act and summarized the customary considerations in determining if a practice reaches the status of an implied provision of the collective agreement. As the parties conceded and the trial court agreed: "It is clear that BN's new mandatory urine testing program does not fall within the scope of any express provision of the collective bargaining agreement."

Pet. App. 9a.

The majority then turned to the issue of whether mandatory urine testing was arguably justified by "either a term implied by past practice (an 'implied-in-fact' term) or a term implied by statute or regulation (an 'implied-in-law' term)." *Id.* As the foundation for its conclusion, the majority noted that "both Rule G and its customary enforcement by sensory surveillance were implied-in-fact terms of the collective agreement between BN and BLE" and that "BN has never disputed that sensory surveillance by BN's supervisors was the primary means of detecting Rule G violations before 1984." *Id.* The court below rejected BN's contention and the trial court's conclusion that

the urine testing program is justified by the past practice of sensory surveillance because

> this conclusion ignores the critical differences between the old method and the new method. The old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion.[10]

Pet. App. 10a.

Analyzing the record evidence, the court said:

> We do not agree that BLE, by acquiescing in Rule G's enforcement by sensory surveillance, can be said to have agreed to allow BN to implement any procedure beyond sensory surveillance so long as the procedure is brought into play by a "modicum of evidence" or an "objective triggering event." The kind of sensory surveillance that BN's supervisors had employed in the past—observing an employee's gait, breath, odor, slurred speech, or blood shot eyes—was non-intrusive. It did not implicate the serious privacy intrusions posed by BN's use of mandatory urine testing. Moreover, the sensory surveillance employed by BN's supervisors in the past required suspicion of individual workers based on their conduct and appearance, whereas the new mandatory urine testing procedure may be imposed on the basis of generalized suspicion encompassing an entire train crew.

Id.

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[10] The dissenting opinion conceded that the majority had correctly stated the applicable legal standards and that the mandatory testing program was new and "an innovation," but "agree[d] with the district court that it is arguable that because the present procedure does not come into play unless there is an objective triggering event which justifies the investigation of a suspected Rule G violation, the urine or blood testing falls within the implied contractual condition of the collective bargaining agreement." Pet. App. 29a.

As a separate, but also supplemental basis for its reading of the facts, the majority referring to the opinion in *Railway Labor Executives' Ass'n v. Burnley, supra,* "decline[d] to assume that BLE members implicitly granted BN the authority to invade their privacy in ways the government could not." Pet. App. 11a.

In holding the dispute was major, the Court said:

> BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance.

Pet. App. 11a-12a.

The court of appeals also noted that "generalized mandatory urine testing is not an implied-in-law condition of the collective agreement, and BLE's resistance to that program constitutes not a minor, but a major dispute." Pet. App. 12a.

REASONS FOR DENYING THE WRIT

This case simply involves the application of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* It involves no question of law that is novel or worthy of review. This Court has defined in detail the standards for determining "major" and "minor" disputes. *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. 711 (1944). In *Detroit & Toledo S.L. R.R. v. United Transportation Union,* 396

U.S. 142 (1969), the Court held that unilateral changes by a carrier in major working conditions without first serving a Section 6 notice and thereafter exhausting the negotiation procedures of the Railway Labor Act was a major dispute and violated Sections 2, Seventh and 6, 45 U.S.C. §§ 152, Seventh, and 156. Therefore, that carrier's actions warranted dismissal of the railroad's complaint for a strike injunction and a grant of relief enjoining its unilateral actions. The status quo to be preserved until the Act's procedures are invoked and exhausted, the Court said, "are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing agreement." *Id.*, at 143.

Moreover, the courts of appeals have developed a well-established, uniform test for deciding whether a set of facts constitutes a major or minor dispute. *See, e.g., United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, at 544 n.5 (3rd Cir. 1974). In sum, this test requires an overview as to whether existing collective bargaining provisions "arguably justify" the carrier's unilateral action or are "reasonably susceptible" of the interpretation being applied by the carrier. Even as the dissenting opinion admits (Pet. App. 13a), the majority correctly set forth the legal standards for determination of the nature of the dispute.

Accordingly, this case involves only the question of whether the court of appeals correctly canvassed the record in a suit brought by a union to prevent a railroad from unilaterally creating and subsequently administering a compulsory drug and alcohol testing program, when the parties were negotiating upon a collaborative program of use prevention combined with an employee assistance pro-

gram and the railroad had a long established practice of particularized suspicion, rather than mandatory blood and urine testing, for enforcement of the rule against drug and alcohol impairment. The court of appeals held that the facts of the case established that the dispute between the parties was a major one involving an attempt by the railroad to insert a new provision in the collective bargaining agreement by creating a new method for enforcing Rule G which is mandatory and requires only generalized suspicion. Pet. App. 10a. Finding a dearth of evidence supporting the district court's view that the dispute was minor, the court had no doubt that the dispute was major—"a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute." Pet. App. 11a. Whether the court of appeals was right in that decision—and it clearly was—is not a question that deserves review by this Court.

The Ninth Circuit had before it a different record than the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). Furthermore, the established practice between BN and that union was far different from BN's past activity with BLE. While the employees represented by that organization apparently may have been subjected to compulsory body fluid testing, which had not been objected to over the years, locomotive engineers were not. On a different set of facts, the Eighth Circuit later held that unilateral changes by a different carrier in Rule G and its enforcement created a major dispute. *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co.*, 827 F.2d 330 (8th

Cir. 1987), *cert. denied*, 56 U.S.L.W. 3677 (U.S. April 15, 1988).

Even if one were to perceive this as a drug and alcohol case, the experts on the subject of reducing or eliminating use of such substances agree that negotiated programs are the most effective, efficient and humane way to deal with the problem. See p. 2, fn. 2, *supra*. And the General Counsel for the National Labor Relations Board agrees that testing is a mandatory subject of collective bargaining and unilaterally established programs violate the duty to bargain in good faith set forth in Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). NLRB General Counsel Memorandum 87-5 (Sept. 8, 1987), 4 CCH Lab. Law Rep. ¶ 9344.[11]

Therefore, contrary to the petitioner's contentions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question under the Railway Labor Act which merits this Court's review. Moreover, the decision is consistent with the hold-

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[11] As the NLRB General Counsel stated, the addition of drug testing "constitutes a substantial change in the employees' terms and conditions of employment," for

> a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc. (Footnote omitted.)

4 CCH Lab. Law. Rep. ¶ 9344 at 19,202.

ings of this Court and its reading of the Railway Labor Act.

I.

THE DECISION IS CONSISTENT WITH THE HOLDINGS OF THIS COURT

This Court established the major-minor dichotomy in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1944) ("Burley"). As petitioner states, the specific procedures for resolving labor disputes under the Railway Labor Act depend upon what category the dispute is classified. (Pet. at 3). "Minor" disputes arise out of the application or interpretation of collective bargaining agreements. *Id.;* see also 45 U.S.C. § 153, First (i). "Major" disputes, on the other hand, relate to proposed changes in collective bargaining agreements. *Id.* They "concern [either] the formation of collective bargaining agreements or efforts to secure new rights and incorporate them into future agreements." *International Association of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985) (citing *Burley, supra*, 325 U.S. at 723).

While minor disputes are resolved through arbitration before the National Railroad Adjustment Board, major disputes are subject to the procedures for notice, negotiation and mediation set forth in Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. §§ 155 and 156. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969); *Burley, supra*, 325 U.S. at 722-25. During the period that the major disputes procedures are being exercised, or should be used, Section 6 of the

Railway Labor Act, specifies that the "rates of pay, rules, or working conditions shall not be altered by the carrier."

The Court has held that the Act's status quo requirement is central to its design. *Detroit & Toledo S.L. R.R. v. United Transportation Union*, 396 U.S. 142, 150 (1969) ("Shore Line"). The purpose of this requirement is to prevent the employees from striking and a carrier from doing anything that would justify a strike. In fact, the "heart of the Railway Labor Act" is the duty to make every effort to reach consensual solutions to disputes in the workplace. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 378.

In *Shore Line*, the railroad claimed that it had the unilateral right under the collective bargaining agreement to establish outlying assignments, because, as BN also asserts, the contract was silent on that subject. The carrier issued a bulletin creating disputed work assignments. The new assignments would have required the employees to report for work at a different point from where they had been reporting for many years. This reporting point was not mentioned in the agreement, but became an established practice through long, customary usage, a practice that could not be changed at the whim of management. *Id.* at 143.

This Court held that the railroad's unilateral changes in reporting points and work assignments without first serving a Section 6 notice and thereafter exhausting the negotiation procedures of the Act violated Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, Seventh and 156, and warranted dismissal of the carrier's complaint for a strike injunction and the grant of relief enjoining its unilateral action. In reaching this conclusion,

the Court rejected the railroad's contention that the status quo which the Railway Labor Act requires be maintained consists only of the working conditions specifically covered in the current agreement between the carrier and union. Instead, what must be preserved as the status quo until the Act's procedures are invoked and exhausted "are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing agreement." *Id.*, 143.

The decision below conforms with the standards elaborated upon by the Court in *Burley* and *Shore Line*. Historically, violations of Rule G have been detected and enforced through sensory surveillance. Pet. App. 3a. BN did not subject employees to mandatory testing, even where there was particularized suspicion that the individual was under the influence of alcohol or drugs. The bargaining agreement was silent on Rule G and did not expressly or implicitly refer to that rule or to its enforcement. BLE opened negotiations with BN upon a cooperative, complete drug and alcohol use and prevention program, and submitted written proposals to BN. While the parties were negotiating, BN unilaterally placed into effect its sniffer dog search and surveillance program. When that program was enjoined, BN unilaterally promulgated the compulsory body fluid testing for accidents and human-factor incidents. These actions of BN sought rights for the future, which it had never previously exercised or had been granted—the typical major dispute. *Burley, supra*, 325 U.S. at 723. Just as the railroad in *Shore Line* argued that the agreement's silence and the justifiable nature of its conduct, in its view at least, gave it the right to act unilaterally, both the district court and BN sought to justify the position that BN could unilater-

ally require submission to chemical testing, because there was no express prohibition in the agreement between BLE and BN and the slightest of incidents was an adequate substitute for the historical sensory surveillance to permit BN to test where it had not before. The court of appeals, however, correctly found this approach was much the same as that taken by the railroad in *Shore Line* and, moreover, misread the facts by "ignor[ing] the critical differences between the old method and the new method." As the Ninth Circuit continued: "The old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion." Pet. App. 10a. In accordance with *Shore Line*, the court of appeals correctly rejected the attempt by BN to change existing legal obligations to the basic employment relationship—changes by which the "jobs of present employees are jeopardized"—without complying with the major disputes procedures set forth in the Railway Labor Act. *Id.* at 6a, 10a.

The decision of the Ninth Circuit is also consistent with this Court's ruling in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 300 (1960), a case involving the question whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, deprived the federal courts of jurisdiction to enjoin a railway union's strike to force the carrier to bargain upon a Section 6 notice requesting a contract provision barring the abolition of jobs without the union's consent. Similar to BN's contention that drug testing is a managerial prerogative, the rail carrier refused to negotiate on the ground the issue was nonbargainable in that a state regulatory agency had permitted it to abandon the work locations where the jobs were to be removed. Finding the dispute related to a

major change in the existing contract, rather than to a mere infraction or interpretation of that contract, the Court reversed the order granting the strike injunction. The Court rejected the contention that an attempt to insert a new provision going to the heart of employment, job security, was not negotiable, and in reply to the traditional carrier argument that the controversy is a minor one, this Court stated:

> . . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of that agreement.

Id. at 341.

Similarly, in the instant case, the court of appeals, adopting the test formulated by the Second Circuit in *Japan Air Lines Co. v. International Association of Machinists*, 538 F.2d 46, 52 (2d Cir. 1976), held that "[t]he Railway Labor Act requires parties to bargain over any proposal whose primary impact is the loss—or potential loss—of existing employment or employment-related benefits." Pet. App. 6a. Based upon this test, the lower court found: "Because jobs of present employees are jeopardized, BN's mandatory urine testing program is a mandatory subject of bargaining under the Railway Labor Act and may not be implemented unilaterally." *Id.* The court below found, therefore, that BN's management prerogative claim did not properly lie. *Id.* Consistent with the decisions of this Court, the court of appeals appropriately found the dispute between the parties to be a major one and reversed the judgment of the district court.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner appears to contend that the decision below should be judged by different standards as to managerial prerogative and major-minor dispute because the subject matter of the dispute is drug testing. Caught up with the current hysteria as to alcohol abuse and drug use, BN seeks a ruling that conditions dictate the immediate institution of compulsory drug testing programs and that carriers should, therefore, be permitted to bypass the Railway Labor Act bargaining procedures. According to this theory, an arbitrator could later place the imprimatur of a pseudo-judicial ruling upon the carrier's action, and the employees and their collective voice would be pacified. Logic would indicate that at a later juncture this special nitch carved from the Railway Labor Act for this type of dispute would be urged to extend to other major disputes. In short, BN is complaining about the process—a process which has been shown to work in the case of CSX Transportation and other rail carriers. If BN has any complaint about the Railway Labor Act, or that bargaining process, it should be directed to the Congress, which currently has before it legislation (H.R. 3051) that could remove this item from the bargaining table.[12]

BN, as well as the dissenting opinion, agree that the majority accurately summarized the standard for distinguishing between major and minor disputes. Pet. 11; Pet. App. 13a. Thus, it becomes obvious that petitioner's contention rests upon its view that drug testing programs

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12 Whether such legislation could withstand challenges under the Fourth Amendment would be another issue.

are nonbargainable or are minor disputes per se, or upon its failure to perceive that the application of the major-minor principles, especially in situations where there is no express contractual provision, is dependent upon the record made in each peculiar situation, and the determination whether that action unilaterally repudiated the collective bargaining agreement,[13] thereby triggering a major dispute under the Railway Labor Act. From this staging point, BN contends that the decision below conflicts with the decisions of other courts in two respects: The court of appeals improperly applied the test by which the major-minor decision turns, and the result is contrary to the decision of the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). It is incorrect on both contentions.

First, since the *Shore Line* case, numerous courts, upon their assessment of the record before them, have found a major dispute to exist where a carrier makes a unilateral change in the "actual, objective working conditions", even though the written agreement was silent on the subject involved in the dispute between the parties. For example, in *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co.*, 827 F.2d 330, 333 (8th Cir. 1987), *cert denied*, 56 *U.S.L.W.* 3677 (U.S. April 15, 1988), a new rule disciplining employees for off duty use or possession of narcotics constituted a formal change of the collective bargaining agreement and, therefore, was a major dispute under the Railway

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[13] In fact, in *Shore Line*, the Court held that the collective bargaining agreement only establishes the minimum terms, for the "status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." 396 U.S. at 153.

Labor Act. In *St. Louis Southwestern Ry. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), contracting out services to non-union employees violated the collective bargaining agreement and constituted a major dispute under the Railway Labor Act. In *Transport Workers Union, Local 553 v. Eastern Airlines, Inc.*, 544 F. Supp. 1315 (S.D. N.Y.), *aff'd as modified*, 695 F.2d 668 (2d Cir. 1982), the use of Braniff flight attendants on Eastern's foreign flights violated Eastern's collective bargaining agreement triggering a major dispute. In a pre-*Shore Line* case, the Fifth Circuit held the leasing out of assets to a non-union entity violated the agreement and constituted a major dispute under the Railway Labor Act. *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183, 190 (5th Cir. 1965). In *Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. April 25, 1988), the Third Circuit held that the unilateral addition of a drug-screening component as part of periodic and return-to-duty medical examinations was a major dispute, "because the undisputed terms of the implied agreement governing medical examinations cannot be plausibly interpreted to justify the new testing program" and the carrier's arguable contractual basis "overlooks what to us is the determinative distinction between the old and new practice: before, drug screening was included only when there was particularized cause and not as part of the routine urinalysis."

In sum, as the Eighth Circuit appropriately said in *Missouri Pacific Joint Protective Board v. Missouri Pacific R.R.*, 730 F.2d 533, at 536-37 (8th Cir. 1984):

> . . . [W]hether a dispute is minor or major is often a question of degree, *Itasca Lodge 2029 v. Ry. Express Agency, Inc.*, 391 F.2d 657, 665 (8th Cir. 1968) (quoting *Rutland R.R. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962),

cert. denied, 372 U.S. 954 (1963), and turns upon the facts in each case. *See United Transportation Union, Lodge 612 v. Illinois Terminal R.R. Co.*, 471 F.2d 375, 379 (7th Cir. 1972); *Rutland*, 307 F.2d at 36. Whether a dispute is minor or major involves first a determination of factual issues, *see Airline Pilots Ass'n v. Northwest Airlines, Inc.*, 570 F.2d 257, 258 (8th Cir. 1978), and then conclusions of law based on those findings.

Second, petitioner claims that the lower court's decision conflicts with the ruling of the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). In reaching this conclusion, not only does petitioner misconstrue the opinion below, but it misreads the standard against which the conclusion of major dispute is to be measured. Petitioner conveniently overlooks the important interrelationship between the factual issues of BN's past practices and operational changes with the legal conclusions regarding the scope of the agreements between the parties. All that the decision of the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, *supra*, establishes is that in canvassing that record as to the past practices between that union and the BN, that court found the changes were minor and the railroad had stayed "within the boundaries of this understanding" and had not "depart[ed] from these established practices in such a substantial way as to abrogate the implied contractual term which they represent." *Id.* at 1022. Based upon the interrelationship of these factual findings and the legal conclusions regarding the scope of the agreements between BN and the maintenance of way employees union, the Eighth Circuit held that post-incident and post-furlough testing were minor. As the decision is based upon that court's canvassing of the record before it, a record far different from that before

the Ninth Circuit, the result cannot be considered in conflict. If it is considered to be inconsistent, it is wrong as the reasoning in the following decisions establish.

That the decision of the Eighth Circuit must be read in this light can be easily gleaned from its most recent decision in *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co., supra,* 827 F.2d 330. In that case, the Eighth Circuit refused to accept an argument similar to that being made by petitioner. After quoting extensively from its prior opinion relied upon by BN in the petition, the court found, upon its review of the record, "that the district court did not err in holding that Rule G, by virtue of the parties' long-standing and recognized custom and practice, has become an implied term in the agreement of the parties." *Id.*, 334. Turning to "whether the pre-amendment version of the parties' agreement (the implied term under the 'old Rule G') is 'reasonably susceptible' to being interpreted in a manner consistent with the post-amendment version (the implied term under the 'new Rule G')" (*id.*), the court concluded (*id.*, 336):

> Common sense and this Court's prior cases indicate that there are limits on the extent to which the CNW may amend Rule G consistent with the history and acquiescence of the parties in past amendments. In this light we agree with the district court that the agreement of the parties (including any terms necessarily implied as a result of established past practices and working conditions) is not reasonably susceptible to the CNW's proposed interpretation whereby it has the right to unilaterally extend its operating rules to regulate off duty use, possession, or sale of illegal drugs in the manner contemplated by Rule G.[5]

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[5] The CNW additionally contends that because it has retained the right to unilaterally amend Rule G since its inception, the status quo imposed pursuant to 45 U.S.C. § 156 must also include that right. * * * On the

(Continued on following page)

Based upon its intertwining of the factual issues into its legal conclusions as to the scope of the agreements between the parties, the Eighth Circuit determined that dispute was major.

Two district courts also have enjoined as major disputes drug testing programs unilaterally established by carriers subject to the Railway Labor Act. In *Transportation Workers Union, Local 234 et al. v. Southeastern Pennsylvania Transportation Authority*, 678 F. Supp. 543 (E.D. Pa. 1988), *appeal docketed*, No. 88-1160, etc. (3rd Cir. Mar. 9, 1988), the district court granted the railway unions a status quo injunction pending exhaustion of the requirements of 45 U.S.C. § 156 for the following reasons that are equally applicable to this case:

> The union's acquiescence in suspicion-based, post-violation, transfer and promotion testing cannot be interpreted as an authorization or even foreshadowing of 87-1. *Brotherhood of Maintenance of Way Employes, Lodge 16*, 802 F.2d at 1023. Only "long standing practices" can be considered part of a collective bargaining agreement in determining whether a proposed change is "arguably justified" by the parties' agreement. *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).
>
> SEPTA proposes to test 45 percent of its operating employees at least once each year. The incidence, focus, rationale for, and employee impact of such testing is substantially different from 85-1, and it obviously will affect the working relationship of the parties. The proposal cannot be "arguably justified" by the terms of prior agreements or the parties' prior practice. The unions are correct that the proposed program constitutes a "major dispute."

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basis of our rejection of the CNW's assertion that any implied term must include the absolute power to amend Rule G unilaterally, we affirm the district court in this regard.

Without benefit of the reasoning of the Ninth Circuit, that court agreed that Rule G and past practices of enforcement do not arguably justify *any* reasonable detection program and enforcement method. Pet. App.10a. Similarly, in *International Brotherhood of Teamsters, Chafeurs, Warehousemen & Helpers v. Southwest Airlines*, No. CA 3-86-3103-R (N.D. Tex. Jan. 9, 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) (Pet. App. 121a), that district court found that, where as here, there was no past practice of mandatory body fluids testing to enforce the rules prohibiting the possession, sale and use of alcohol and drugs, the creation of "a comprehensive program for monitoring, testing and punishing employees and following up on detected drug-alcohol use" did "constitute a major dispute in its implementation and that the union would be entitled to the injunction it seeks under the Railway Labor Act." Pet. App. 128a.

In any manner viewed, the decision of the court of appeals is consistent in reasoning with prior Railway Labor Act decisions and does not conflict with any applicable holding in any other circuit.

III.

THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

As we have shown, this case involves only a Railway Labor Act issue—one which has been authoritatively determined by this Court, was decided under a uniform standard followed by the various courts of appeal (*see United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, at 544 n.5 (3rd Cir. 1974)), and has been ruled upon in a consistent manner by various courts. Moreover, petitioner is requesting this Court to address an issue that is more properly one to be determined, if at all, by legisla-

tion—legislation, regardless of its merit, that could remove drug and alcohol testing programs from the collective bargaining table and give employers exclusive authority to promulgate massive testing programs.

In a disingenuous argument that relies upon hyperbole, *e.g.*, issue of "major national importance," "public interest in safety," "need for prompt and effective responses," need "to tailor solutions to specific problems," "incentive to increase the effectiveness of their programs," ability to use "new and superior technologies," BN attempts to turn a relatively simple labor issue into a unique and unusual situation. As previously established, that claim is based upon an erroneous view of what the court of appeals decided in this case; it did not decide that employees can use alcohol and drugs with impunity. That claim is contrary to the prevailing view that drug testing affects employment relationships and is a working condition. That claim is contrary to the well held principle that drug testing is an appropriate subject of collective bargaining.[14] That position contravenes well held expert opin-

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[14] In NLRB General Counsel Memorandum 87-5 (Sept. 8, 1987), 4 CCH Labor Law Rep. ¶ 9344, the General Counsel for the National Labor Relations Board opined that: (1) drug testing for employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d); (2) implementation of a drug testing program is a substantial change in working conditions even where physical examinations previously had been given and even if established work rules precluded the use or possession of drugs in the plant; and (3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable will be applied to drug testing. BN's argument that it has, or should have, an absolute right to change conditions of employment with respect to drug use is diametrically opposed to the position of the NLRB's General Counsel.

ion that effective drug and alcohol control programs must be cooperative labor-management programs and fashioned through collective bargaining. Manello, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads*, Federal Railroad Administration, Technical Report, Contract No. DOT-TSC-1375 (1979). See also testimony of Dr. Robert J. Pandina, Resp. App. at 4a.

Nor is this an appropriate vehicle to be used to provide guidance upon the factors and considerations that BN places before the Court. The issues raised in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 *U.S.L.W.* 3590 (U.S. Mar. 1, 1988) (No. 86-1879), and *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988), are of far greater importance than the Railway Labor Act issue raised by the instant petition and any rulings therein would provide significant direction in regard to those factors. This case too is such that a well-considered opinion cannot be given upon the considerations advanced by BN, assuming the record would permit them to be reached. Those matters should be left to a case in which they can be appropriately determined judicially, if at all.

If anything, this matter has been in progress since 1985. During that period, BN could have bargained with BLE regarding a comprehensive, cooperative program. Instead, BN has steadfastly refused to bargain. During that same period, BLE has negotiated a "model program" with CSX, for example. If BN had bargained in good faith with BLE on a complete drug and alcohol program, which includes testing as in the CSX program, its concerns and the concerns of BLE and its members might have been accommodated long before now.

Until the Congress sees fit to remove particular subjects from the collective bargaining sphere, the public interest will best be served by requiring adherence to the mandatory requirements of the Railway Labor Act. Collective bargaining will also insure that each employee's rights will be adequately protected. With those procedures being collectively bargained with adequate safeguards that would necessarily be developed in any collaborative program, it would be likely that litigation and controversies will be limited, thereby reducing strains upon the forums dealing with such problems and tensions in the labor-management relationship.

In any event, BLE submits that this case does not involve a situation demanding the exercise of this Court's guidance, as contended by petitioner. The determination of the court of appeals, whether or not correct—and respondent believes it was—is not one warranting this Court's attention.

———o———

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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APPENDIX

Excerpts of Testimony of Robert J. Pandina from Transcript in *Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority* Civil Action No. 87-0389, etc., United States District Court for the Eastern District of Pennsylvania (678 F. Supp. 543 (E.D. Pa. 1988)).

(February 5, 1987)

(p. 267) ROBERT J. PANDINA, having been duly sworn, was examined and testified as follows:

(Direct Examination)

(p. 283) Q. What other elements would you think are essential to provide an effective or successful program?

A. I preface my remarks by saying this is an area in which a tremendous amount of clinical and what we would call experimental, or quasi-experimental work is being done at the present time. It is far from an exact science, if you will.

However, we have learned some lessons from our experience to date. For example, it is my opinion, based on my experience and from the examples in which I have been involved, that any effective program must have a number of elements with the treatment rehabilitation component being only one of those legs of the stool upon which such a program can rest.

Another element is clearly an education and training program. And here, by that I mean a broad-based program. Not simply for supervisors or for management, but would also include employees to help to motivate em-

ployees to understand the problems involved in any drug usage and the ways in which such drug usage could compromise their competency not only on the job but in their own personal functioning.

In a sense, here we are talking about a kind of motivational component and an information component. We are trying to inform people what the problems related to drug use are. And to motivate them to be abstinent; that is, drug free.

A second component part of that training program is (p. 284) also to help train them with regard to the rules, whatever those rules are, with regard to company management policies so that they understand how to use such systems as rehabilitation systems. After all, a rehabilitation system cannot be very effective if you cannot obtain bodies to put in the system, and it is important to find a way to motivate employees to the system and teach them how to use it.

You must also train others in a position of authority, such as management personnel, supervisors, you must train them in the same way that you train all employees with regard to problems related to alcohol and drug use and abuse, and as well as to train them to the way the system operates in that particular culture.

You then, in addition to education and training programs, must also have a rehabilitation component; that is, a treatment component, including a screening component which would allow you to deal with employees who have such problems.

A third and important element is a set of rules and penalties, sanctions, with regard to use of various kinds

of substances in the environment, and there needs to be, in essence, sanctions against the use of such drugs, or use of such drugs in a manner in which they will interfere with or can potentially interefer (sic) with the performance of the individual. This is, in a sense, an external incentive.

I make a distinction between a motivation where we (p. 285) are attempting to provide information to the individual to motivate them toward a particular behavior, and an incentive in the environment.

One of the other incentives in the environment, I consider this to be critical, is the ability of the system to deal with individuals who voluntarily come forward to be treated and not to impose severe sanctions against people who voluntarily come forward.

I would also be concerned that those individuals receive whatever compensation during that period of disability that they might receive, as they might receive for any other disability. In other words, it has to be within the culture, the climate of the organization.

I would expect the organization, for example, if it paid for sick benefits for pneumonia, or a mental dysfunction, also to pay for any drug abuse treatment, up to some reasonable limits, and that is negotiated between the management and the union.

Those are the basic elements in any what I would consider to be a good program. Without any of those, you've got some real problems.

* * *

(February 6, 1987)

(Cross-Examination)

(p. 492) Q. I gather from your testimony in chief that you do believe that one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management.

A. Absolutely.

Q. And would you say that there should be negotiated programs between those parties?

MR. MEYER: I object, your Honor. That really goes to one of the matters that you have to decide in this case.

THE COURT: Overruled.

You may answer.

A. Could you restate the question, or could we have it read back?

(p. 493) (The court reporter read back the pending question.)

A. Under the best of circumstances, that would be most desirable.

Q. And, would you say in your judgment that the negotiations should include a cooperative labor management rehabilitation phase in that program?

A. I don't think I understand your terminology, sir.

Q. Or should the two parties, labor and management, sit down and also draw up the requisites, and et cetera, of a rehabilitation program?

A. In theory I would say that that is an important element. Of course you also have to take into account, as you probably well know, the history of the way labor and management have operated in the past in such types of agreements.

* * *

(September 21, 1987)

(Recross-Examination)

(p. 97) Q. I believe you testified last time that represent—involvement by a labor union, representing employees, is important in an EAP, if the EAP is going to work; is that correct?

(p. 98) A. I said that's an important element, yes, it's a desirable element, yes.

Q. What role would that the union have in that circumstance?

A. I would see the chief role of that union would be to encourage its membership to participate in the employee assistance program. I would also see it joining it as a partner in that EAP program, particularly in the area, as I've mentioned, to encourage individuals to participate. I would hope that they would have the opportunity to make comment on the program that was suggested by management.

* * *

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,	)	No. 85-4138
Plaintiff-Appellee,	)	D.C. No. CV 84-213-GF
vs.	)	
BURLINGTON NORTHERN RAILROAD COMPANY,	)	OPINION
Defendant-Appellant.	)	(Filed Feb. 11, 1988)

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and submitted July 8, 1986
Seattle, Washington

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

Defendant/appellant Burlington Northern Railroad Company (hereinafter BN) appeals from the district court's grant of a permanent injunction in favor of plaintiff/appellee Brotherhood of Locomotive Engineers (hereinafter BLE). BLE had sought declaratory and injunctive relief to enjoin BN from using dogs (hereinafter sniffer dogs) trained to detect the presence of controlled substances on the person or in the personal effects of railroad

employees in violation of the notice, negotiation, and mediation requirements imposed by the Railway Labor Act (hereinafter RLA), 45 U.S.C. §§ 152, Seventh and 156 (1982). The question we must resolve is whether BN's random use of sniffer dogs to detect the presence of controlled substances on the person or in the personal effects of railroad employees presents a "minor" or "major" dispute under the Act, 45 U.S.C. §§ 151-188. This case was consolidated for argument with *Brotherhood of Locomotive Eng'rs v. Burlington N. RR.*, No. 85-4137 (9th Cir. 1986) (hereinafter the *Chemical Testing Case*), wherein we reviewed BN's practice of mandatory urine and blood testing practice following an accident or operating rule violation. We affirm because the facts demonstrate that BN's random use of sniffer dogs is not arguably permitted under the parties' implied agreement. Therefore, the dispute between the parties is major and must be resolved through mediation and negotiation.

I. FACTS AND PROCEDURAL HISTORY

Following two serious train crashes in April 1984, BN intensified its efforts to enforce Rule G which prohibits the possession or use of alcohol, controlled substances or medications that may adversely affect safety.[1] BN con-

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[1] Rule G provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property, is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

tracted for the services of trained handlers and sniffer dogs to detect the presence of controlled substances on its premises.[2] The sniffer dogs were sent to workplaces throughout BN's extensive railway system. Locations were usually selected because of a high incidence of accidents or safety violations. Occasionally, however, the dog handlers responded to tips of controlled substance usage. The district court found that some locations were chosen randomly.

The dogs were used to inspect vehicles in railroad parking lots, and were taken through yard offices and company buildings. During the random searches, the dogs also sniffed the personal effects of engineers coming on duty.[3] A BN supervisor would randomly request an engineer to place his grip on the ground and to step back while the dog sniffed around the closed container. The dogs were not ordered to sniff the person of the engineer. If the dog "alerted" on the grip, the supervisor would take the engineer to an office and request that the engineer sign a form consenting to a search. BN security staff would then search the grip, the engineer's person, and his vehicle. If the engineer refused to consent, he was sus-

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[2] There was evidence that after 1977, BN had occasionally used sniffer dogs to detect controlled substances. A dog handler testified that he had conducted searches using sniffer dogs for controlled substances on BN property on ten occasions prior to 1982. These searches included a search of a crewmember's personal effects. BN records indicate that between May 1984 and October 1984, BN spent over $90,000 on sniffer dogs, including $36,000 for September alone.

[3] Engineers and train crews frequently have to spend time away from home as part of their duty. These employees carry their personal belongings in grips.

pended from service pending investigation for a possible Rule G violation.[4]

BLE opposed the random use of sniffer dogs and urged BN to end the practice. BN refused to discuss the issue.

On October 5, 1984, BLE obtained a preliminary injunction preventing BN from using sniffer dogs. On July 31, 1985, after an evidentiary hearing, the district court granted the Brotherhood a permanent injunction under section 6 of the Act, 45 U.S.C. § 156.

The district court rejected as "specious" BN's claim that deciding the method of detection of safety rule violations falls within BN's managerial prerogative and thus is not a matter for collective bargaining. *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 163, 169 (D. Mont. 1985). The district court noted that the collective bargaining agreements between the parties made no reference to Rule G, nor to any specific method of detecting alcohol or controlled substance abuse, nor to blood and urine tests. The court found, however, that the proce-

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[4] Documentary evidence submitted to the district court showed that the dog teams operated in 50 locations in 17 states between May 1984 and October 1984 when the district court preliminarily enjoined the program. The dogs checked the personal effects of approximately 1000 train crews, including 250 engineers. The dogs alerted on the grips of 15 engineers; the subsequent searches did not disclose the presence of controlled substances. The dogs alerted on the grips of 61 non-engineer crewmembers; four positive searches ensued: one produced a bottle of alcohol, three uncovered controlled substances. Uncontroverted BN evidence showed a 26% increase in Rule G violation detections in the five months of the program over the first four months of 1984. In the same period, accidents and safety-related rule violations decreased by 52%.

dure for the detection and investigation of alcohol or controlled substance abuse adopted by the railroad, and acquiesced in by the union, had existed over a substantial period of time and had become an implied provision or condition of the collective bargaining agreement. *Id.* at 170. The district court also found that the procedure employed by the railroad to implement Rule G consisted of sensory observation by a supervisor of objective symptoms of alcohol or substance abuse, such as slurred speech, staggered walk, alcoholic breath, followed by a voluntary blood or urine test, if the employee wished to clear himself of suspicion. The court held that because the evidence presented at the hearing demonstrated that the practice of randomly searching the personal effects of employees was never agreed to, or acquiesced in, by BLE, the dispute was major and not "arguably justified" under the terms of the implied agreement extant between the parties. *Id.* at 171-72. The district court enjoined BN from attempting to change the implied agreement between the parties with respect to the detection of violations of Rule G.

II. STANDARD OF REVIEW

We review the grant of a permanent injunction for an abuse of discretion. *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986), *cert. denied*, — U.S. —, 104 S. Ct. 2462. Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions. *Sports Form, Inc. v. UPI*, 686 F.2d 750, 752 (9th Cir. 1982); *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1133-34 (9th Cir. 1979).

III. ANALYSIS

BN has presented three discrete and inconsistent theories in support of its contention that the district court abused its discretion in granting a permanent injunction. First, BN claims the use of sniffer dogs is not a proper subject for collective bargaining. Secondly, the railroad contends that use of sniffer dogs has become an implied term of the collective bargaining agreements through past practice. Finally, it is asserted that the use of sniffer dogs was omitted from the collective bargaining agreements and does not create new rights. The record does not support any of these arguments. We analyze each theory under separate headings.

A. *Managerial Prerogative*

BN contends that since no provision of the collective bargaining agreement between the parties restricts the methods or procedures for detecting violations of Rule G, any procedure it chooses to employ is a matter within BN's managerial prerogative. Therefore, BN reasons, its unilateral implementation of a particular method of detection, such as the use of sniffer dogs, is not a labor dispute under the Act.

This claim lacks merit. As discussed below, because of the existence of an implied agreement regarding the procedures BN may employ in detecting alcohol and substance abuse, BN's choice of methods to detect violations of Rule G is not a matter of managerial prerogative.[5]

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[5] We express no opinion as to whether measures such as those imposed by BN in this case could be justified as an exercise of managerial prerogative in the absence of an implied agreement.

Accord, Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R., 802 F.2d 1016, 1021, n.21 (8th Cir. 1986) (summarily rejecting BN's management prerogative in a related case).

B. *The Dog Sniffing Practice Is Not Arguably Justified*

BN contends that even if its decision to use sniffer dogs is not a matter of managerial prerogative, the challenged method of detection is only a minor dispute under the Act because the practice is arguably justified by the parties' implied agreement. We disagree. The parties' implied agreement required a triggering event—the perception of facts that a specific worker had exhibited symptoms of the use of alcohol or a controlled substance—before further investigation could be undertaken. The use of the sniffer dogs was not triggered by an observation that a specific individual was exhibiting objective symptoms of the use of alcohol or a controlled substance. It is quite true that the choice of the *location* of a search was not always random. The district court found, however, that the selection of the *individual* to be searched was random.

Beyond this, under the implied agreement, an investigation was permitted to determine *prior* consumption of alcohol or controlled substances. The district court found that "[t]he practice which evolved over time was one premised upon a determination, through sensory observation, that cause existed to believe a particular employee was *under the influence* of a substance prohibited by Rule G." *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 170 (emphasis added). Additionally, the court determined

that "[i]f, on the basis of his observations, a supervisor concluded that an on-duty employee was *under the influence* of a prohibited substance, the supervisor would conduct a further investigation and, if necessary, ultimately initiate the appropriate disciplinary procedures." *Id.* (emphasis added). Thus, the implied terms of the collective bargaining agreements did not include a search for the *possession* of alcohol or controlled substances to prevent *future* use. Therefore, the random use of sniffer dogs by BN to detect possession of controlled substances, in the absence of objective facts demonstrating prior use, is not arguably permitted under the implied agreement.

C. *"Omitted Case"*

BN contends that since there is no specific provision in the collective bargaining agreements limiting the methods of detecting violations of Rule G, the use of dogs to detect the possession of a controlled substance is an "omitted case" under *Ry. Labor Executives Ass'n v. Atchison, T. & S. F. Ry. Co.*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971). BN's reliance on *Atchison* is misplaced.

The term "omitted case" first appears in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945). In defining a minor dispute, the Supreme Court instructed as follows:

> [A minor] dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. *In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries.*

Id. at 723 (emphasis added; *cf. Airline Flight Attendants in Service of Int'l Texas Airlines, Inc. v. Texas Int'l Airlines*, 411 F. Supp. 954, 959 (S.D. Tex. 1976) (the court held that the "dispute is arguably covered by the parties' collective bargaining agreement[,]" *id.* at 960, and in dictum discussed the omitted case theory, *id.* at 961), *aff'd mem.*, 566 F.2d 104 (5th Cir. 1978). The Supreme Court has not subsequently applied the term "omitted case."

BN argues that "since the written agreements are admittedly silent, [the dispute] should be considered an omitted case, and thus a minor dispute referrable to the Adjustment Board." Adoption of this bold and novel proposition would eliminate the major dispute resolution procedures of the Act. Under the Act, as interpreted by this court, major disputes involve "efforts to secure new rights" not now part of a collective bargaining agreement. *Int'l Ass'n of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). BN's assertion of the right to use sniffer dogs to search the personal effects of its employees for possession of a controlled substance is not a part of the express or implied terms of the existing collective bargaining agreements. Therefore, the issue presents a major dispute.

In *Atchison*, railway employees brought an action for damages for loss of work resulting from discontinuance of the operation of four interstate trains by the railroad. 430 F.2d at 995. The employees attempted to evade the Railway Labor Act by styling their claim as a tort action for the violation of a statutory duty, and not therefore, a matter within the exclusive jurisdiction of the Adjustment Board. *Id.* at 997. The district court dismissed the action

because the challenged conduct raised a minor dispute "properly cognizable by the National Railroad Adjustment Board under provisions of the Railway Labor Act, 45 U.S.C. §§ 151-162." *Id.* at 996. We agreed with the district court and affirmed. *Id.* at 997. We noted that "[i]t is also *undisputed* that this is a 'minor dispute" in the sense that 'the claim is to rights accrued, not merely to have new ones created for the future.'" *Id.* at 996 (quoting *Elgin*, 325 U.S. at 723) (emphasis added). Because it was "undisputed" that the dispute was minor, it was not necessary for us to explicate the factual theory supporting this finding. Nevertheless, our opinion contains the following explanatory dictum:

> Here the collective agreements make no specific provision for the payment of wages following discontinuance of a train. However, nothing in the agreements exclude such protection for the affected employees. Whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the 'usage, custom, and practice' of the industry, or whether it was rejected following negotiation does not appear in the record and is a matter requiring the expertise of the Adjustment Board.

Atchison, 430 F.2d at 996 (citations omitted). Unlike the procedural posture of the case presented to us in *Atchison*, where we dismissed the action on jurisdictional grounds, this matter is before us after a trial on the merits. Thus, we have a record regarding the "usage, custom, and practice of the industry." We need not speculate as to BN's theory or the factual bases for the district court's holding. BN did not contend before the district court that the use of sniffer dogs to detect possession of a controlled sub-

stance was omitted from the collective bargaining agreements because the parties relied on the language of a statute to support the use of sniffer dogs. It cannot do so now for the first time on this appeal. We need not guess whether the parties relied on custom, usage, and practice concerning the procedures followed by BN. The trial court heard evidence on this factual issue and found that there was an implied agreement between the parties based on custom and practice. *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 170. The district court expressly found that the procedures used by BN and acquiesced in by the Brotherhood did *not* include the use of sniffer dogs for the random detection of the possession of a controlled substance. *Id.* at 171-72. The facts support this finding. We review findings of fact following the granting of a permanent injunction under the clearly erroneous standard.

The district court's determination that the implied agreement did not arguably justify the use of sniffer dogs was not clearly erroneous. Furthermore, the fact that there was an implied agreement covering the procedure to be used in detecting Rule G violations demonstrates that this subject matter was not "omitted" from the collective bargaining agreement.

BN also argues that the use of sniffer dogs was not random. This, too, presents a question of fact which was resolved against BN by the district court. The facts, while conflicting, support the court's finding that the searches of the personal effects of individual employees were random. The record contains evidence that the dogs were used to sniff the personal effects of railroad workers notwithstanding the fact that there was no evidence that the specific individual had used or was then in the possession

of a prohibited substance. Evidence presented by BN showed that on some occasions the dogs were sent to locations where there had been a high incidence of accidents or safety and operating rule violations. No proof was offered, however, that BN supervisors were aware, *prior to the search*, that each person, whose personal effects were subjected to dog sniffing at such places, had a controlled substance in his possession, or was observed to be under the influence of a controlled substance. The district court's finding that the searches were random is not clearly erroneous.

The district court did not abuse its discretion in granting an injunction. The use of sniffer dogs presented a major dispute.

The judgment is AFFIRMED.

COUNSEL

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Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company, No. 85-4138

(Filed February 11, 1988)

PREGERSON, Circuit Judge, concurring.

In this appeal, we are called on to decide whether the Railway Labor Act ("RLA") bars Burlington Northern from unilaterally implementing a sniffer dog program de-

signed to restrict alcohol and narcotics use by on-duty railroad workers. The program requires engineers, before embarking on trains from certain yards, to submit their grips to a trained dog to sniff for the presence of controlled substances. Although I concur in the result arrived at by Judge Alarcon's opinion, I get there by a somewhat different route. First of all, I deal more extensively with the management perogative issued (sic) raised by Burlington Northern. Second, I explicitly reject the district court's "modicum of evidence" approach for determining whether the sniffer dog program is arguably justified by the collective agreement's implied sensory surveillance provision. Instead, I base my analysis on the arguable intention of the parties as manifested by custom and practice. I conclude that the program is not justified. Finally, because Burlington Northern raised the "omitted case" doctrine before the district court, I have sought to clarify the doctrine and show that it is inapplicable to the dog sniff procedure.

FACTS

For at least 40 years, Burlington Northern ("BN") in common with many other railroads, has had a unilaterally implemented safety rule ("Rule G") prohibiting its employees from using both alcohol and narcotics while on duty and from possessing such substances while on company property. Rule G also bars employees from reporting for duty in a state of intoxication that may in any way impede their ability to perform their work safely.[1]

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[1] Rule G presently states:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by

(Continued on following page)

The collective bargaining agreements between BN and its employees' unions do not expressly or implicitly refer to Rule G.

Undisputed evidence presented to the district court indicated that, before May 1984, BN relied primarily upon sensory surveillance to enforce Rule G. If an employee's gait, breath, odor, slurred speech, bloodshot eyes, or errant behavior suggested to a supervisor or security officer that the employee was intoxicated, BN suspended the employee pending a formal investigation under established procedures.

On April 15, 1984 a train crash in Wiggins, Colorado killed five BN employees and caused $2 million in property damage. The National Transportation Safety Board ("NTSB") implicated alcohol abuse by an engineer as a possible cause of the accident. On April 21, a train disobeyed an "absolute stop" signal and crashed into a standing train at Newcastle, Wyoming. Two BN employees died and property damage totaled $1 million. A toxicology report indicated that three crew members had marijuana traces in their body fluids.

Following these two serious crashes, BN intensified its efforts to enforce Rule G by introducing two new pro-

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(Continued from previous page)

> employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

BN unilaterally added the reference to "marijuana, or other controlled substances" in 1980.

grams. First, all crew members involved in an accident or operating rule violation were required immediately to attend a clinic and submit to a urinalysis test for the presence of narcotics. Only crew members involved in accidents or operating rule violations demonstrably due to equipment failure were exempted. Moreover, BN's rules required any employee suspected through sensory surveillance of intoxication to submit to mandatory urinalysis. An employee who refused to submit to mandatory urinalysis was subject to discipline for insubordination.[2]

Second, BN contracted for trained sniffer dogs to detect narcotics on its premises. The dog teams visited work places throughout BN's extensive network. Locations were usually selected by their high incidence of accidents or safety violations, and occasionally the dog teams responded to tips of drug usage. A few locations also were chosen randomly. The dogs checked vehicles in parking lots and were taken through yard offices and company buildings. The dogs also sniffed the "grips" of engineers coming on duty.[3]

In conducting the sniffer dog program, the following procedures were employed. A BN supervisor would

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[2] BN's mandatory urinalysis program closely mirrors Federal Railroad Administration ("FRA") regulations that took effect on November 1, 1985. *See* 49 C.F.R. § 219 (1985). The district court upheld the FRA regulations over a fourth amendment challenge, and the appeal. *Railway Labor Executives' Association v. Dole*, No. 85-2891, was argued before us on the same day as this case and another companion case involving BN's mandatory urinalysis program, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, No. 85-4137. These cases will be dealt with by separately filed opinions.

[3] Engineers and train crews are frequently required to spend time away from home. On those occasions, these employees carry their personal belongings in grips.

request the engineer to place the grip on the ground and to step back while the dog sniffed around the grip. If the dog "alerted" on the grip, the supervisor would take the engineer to an office and request that the engineer sign a form consenting to a search of the grip. BN security staff would then searched (sic) the grip, its contents, the engineer's person, and often also the engineer's car, for narcotics. The dogs did not sniff the engineer. If the engineer refused to consent to a search, the supervisor suspended the engineer from service pending an investigation for a possible Rule G violation.[4]

The Brotherhood of Locomotive Engineers ("BLE") strenuously opposed the use of the sniffer dogs and urged BN to end the program. BN refused to negotiate. BLE then balloted its branch chairmen on whether to strike on the sniffer dog issue. A majority of respondents voted in favor of a strike.

The district court granted BLE a preliminary injunction on October 5, 1984 prohibiting BN from using the

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[4] The searches were exceptionally thorough, including fanning the engineer's checkbook, taking the credit cards from his wallet, and checking under the carpet of his car. Two engineers testified that their consent to the searches was involuntary because they understood that a refusal to consent would result in a discharge. Neither of the testifying engineers was charged with a Rule G violation.

Documentary evidence shows that the dog teams operated in fifty locations in 17 states from May 1984 until October 1984 when the district court preliminarily enjoined the program. The dogs checked the grips of approximately 1000 train crew members, including 250 engineers. The dogs alerted on the grips of 15 engineers; *all* of the subsequent searches of those grips *revealed nothing*. The dogs alerted on the grips of 61 non-engineer crewmembers; four positive searches resulted: one produced a bottle of alcohol, and three uncovered narcotics.

sniffer dogs. After conducting several evidentiary hearings, the court announced its decision in an opinion filed in July 1985. *See Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 620 F. Supp. 163 (D. Mont. 1985). The district court found that "sensory surveillance by certain supervisory personnel" supported by "at least a modicum of evidence" of intoxication had been established by custom and practice as the only method of enforcing Rule G. The district court further found that this custom and practice constituted an implied term of the collective agreement. 620 F. Supp. at 170-171. The court stated that "[t]he critical term of [the collective] agreement . . . is the term requiring a modicum of evidence that a particular employee was operating under the influence of a prohibited substance, before a supervisor could conduct further investigation." *Id.* at 175.

The court concluded that random use of sniffer dogs was not "arguably justified" under the collective agreement as amended by custom and practice, and thus BN's use of sniffer dogs, challenged by the unions, constituted a "major dispute" under the RLA requiring the court to enjoin the sniffer dog program. *Id.* at 172. BN appealed this decision which is the subject of the instant appeal.

STANDARD OF REVIEW

Whether a matter constitutes a mandatory subject of bargaining under the RLA is a question of law which we review *de novo*. *See Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52-53 (2d Cir. 1976); *cf. NLRB v. International Harvestor Co.*, 618 F.2d 85, 87 (9th Cir. 1980). Whether past conduct constitutes custom and practice sufficient to be incorporated as an implied term in a collective agreement

covered by the RLA is a question of fact. *See Missouri Pacific Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada v. Missouri Pacific Railroad Co.*, 730 F.2d 533, 537 (8th Cir. 1984); *cf. Hass v. Darigold Dairy Products Co.*, 751 F.2d 1096, 1101 (9th Cir. 1985) (implied terms in collective agreement under NLRA). We accept a district court's determination of questions of fact unless clearly erroneous. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Whether a dispute constitutes a major dispute or a minor dispute under the RLA is a matter of law which we review *de novo*. *IAM v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985).

ANALYSIS

BN presents alternative arguments in support of its contention that the district court may not enjoin the dog sniff program. BN first contends that the enforcement of Rule G is a matter entirely within its managerial prerogative. Alternatively, BN contends that the challenged procedure presents not a major but a minor dispute, over which the district court lacks jurisdiction, because: (1) the procedure is arguably justified by an implied-in-fact term of the collective agreement; or (2) the procedure is covered by the omitted case doctrine.

A. *Management Prerogative*

Neither party disputes the fact that Rule G itself is an implied term of the collective agreement. BN asserts, however, that selecting the method used to enforce a safety rule like Rule G is entirely a matter of management prerogative and not subject to collective bargaining. BN

argues that, because Rule G enforcement is a matter of managerial prerogative, it is not an issue subject to collective bargaining under the RLA. Thus, any prior enforcement practice cannot be an implied condition of the collective agreement or give rise to a labor dispute within the terms of the RLA.

The district court rejected this position. 620 F. Supp. at 169. I agree with the district court that BN's management prerogative claim is unfounded.

The RLA requires BN "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, *and working conditions.*" 45 U.S.C. § 152 (emphasis added). No court, however, has comprehensively explained the scope of the statutory phrase "working conditions."

In *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 51-53 (2d Cir. 1976), the Second Circuit rejected as inconsistent with the legislative history and purpose of the RLA, the union's assertion that the RLA required the parties to bargain over *any lawful proposal* advanced by either side. It held that the RLA mandated bargaining only over "rates of pay, rules, and working conditions." *Id.* at 52. *Accord IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 556-57 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *Brotherhood of Railroad Trainmen v. Akron and Barberton Belt Railroad Co.*, 385 F.2d 581, 599 (D.C. Cir.), *cert. denied*, 390 U.S. 923 (1968). Therefore, the court upheld the carrier's management prerogative to determine whether to cease subcontracting ground work at certain airports because the "primary impact" of the union's proposal did not affect the working conditions of the union's present

members. 538 F.2d at 52. In so holding, the Second Circuit contrasted *Japan Air Line's* situation with that which existed in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *Order of Railroad Telegraphers v. Chicago North Western Railway Co.*, 362 U.S. 330 (1964), in which "the critical question was whether those who were working were to lose their jobs." 538 F.2d at 52-53.

The *Japan Air Lines* approach is simple and pragmatic: if loss of existing employment or employment-related benefits, or potential loss, is the primary impact of the proposal at issue, the RLA requires the parties to bargain over the proposal consistent with the Act's procedures. I would adopt this approach as the rule of this circuit. Here, a Rule G violation, however discovered, could result in an employee's discharge. The critical issue in this case is whether the jobs of present employees are jeopardized by the two enforcement programs. Because jobs of present employees are jeopardized, BN's sniffer dog program is a mandatory subject of bargaining under the RLA and may not be implemented unilaterally.

The district court was, therefore, correct to reject BN's assertion of management prerogative and to reach the question of the nature of the dispute under the RLA.

B. *Major v. Minor Dispute*

Under the Railroad (sic) Labor Act, disputes between railroads and their employees fall into two "sharply distinguished" categories—"major disputes" and "minor disputes." *See Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 722, (1945), *aff'd on rehearing*, 327 U.S. 661 (1946); *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141,

1145-56 (9th Cir. 1975) (tracing historical development of RLA).[5]

Major disputes arise out of the formation of collective bargaining agreements or unilateral efforts to secure new rights and incorporate them into future agreements. *Elgin*, 325 U.S. at 723; *Aloha*, 776 F.2d at 815. Minor disputes involve the interpretation or application of existing collective bargaining agreements. *Elgin*, 325 U.S. at 723; *Aloha*, 776 F.2d at 815. The distinction between minor and major disputes has important procedural consequences.

Generally, *major* disputes are "left for settlement entirely to the processes of noncompulsory adjustment." *Elgin*, 325 U.S. at 723-24. A detailed procedure is provided in 45 U.S.C. §§ 152, 155, 156, 157, and 160 for moving the dispute through initial conference and negotiation, submission to the National Mediation Board, voluntary arbitration and, possibly, investigation by a special emergency board appointed by the President. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). "No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin*, 325 U.S. at 725. Pending the exhaustion of the Act's mechanisms for resolving a major dispute, the status quo applies. The duty to maintain the status quo may be enforced by obtaining injunctive relief in a federal district court. *See Aloha*, 776 F.2d at 816.

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[5] The terms "major dispute" and "minor dispute" are not found anywhere in the RLA. The Supreme Court in *Elgin* coined the terms as a methodology to be used by courts confronted by disputes arising under the RLA. *See Aloha*, 776 F.2d at 815 n.2.

In contrast, *minor* disputes are subject to compulsory and binding arbitration. *See* 45 U.S.C. § 153(first)(i). This task is performed by the National Railroad Adjustment Board or a privately established arbitration panel. *See generally* Seidenberg, *Grievance Adjustment in the Railroad Industry* in *The Railroad Labor Act at Fifty* 229-35 (National Mediation Board ed., 1976). The arbitrators have exclusive jurisdiction over minor disputes. *See Slocum v. Delaware, Lackawanna & Western Railroad Co.*, 339 U.S. 239, 244-45 (1950). Thus, federal courts have no subject matter jurisdiction over minor disputes. *Aloha*, 776 F.2d at 815. When only a minor dispute is involved, there is no duty to maintain the status quo and judicial review of the arbitration panel's decision is extremely limited. *See Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 91 (1978) (per curiam).

The test in our circuit for determining if a dispute involves only the interpretation or application of an existing agreement, and is therefore minor, or involves the formation of a collective agreement or a unilateral effort to change working conditions, and is therefore major, derives from *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). *See Aloha*, 776 F.2d at 815-16; *O'Donnell*, 551 F.2d at 1146-47; *Southern Pacific Transportation Co. v. United Transportation Union*, 491 F.2d 830, 832 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974). We have reformulated the test several times. *See Switchmen's*, 398 F.2d at 447 (only if the disputed action is "in nowise contemplated or arguably covered by the agreement" does it give rise to a major dispute); *Southern Pacific Transportation Co.*, 491 F.2d at 832-33 (A dispute is minor when a contract provision is "rea-

sonabl[y] susceptible" to a party's interpretation); *O'Donnell*, 551 F.2d at 1146 ("Is the position of at least one of the parties *arguably* predicated on the terms of an agreement?"); *Aloha*, 776 F.2d at 816 (major dispute concerns issue "neither contemplated nor arguably covered" by collective agreement).

The district court accurately summarized the essence of these various reformulations as *whether the railroad's actions are "arguably justified" by the collective agreement* between BN and the BLE. *See* 620 F. Supp. at 175. If the railroad's actions *are* arguably justified, the dispute is a *minor* dispute; if they are *not* arguably justified, the dispute is a *major* dispute. When in doubt, courts construe disputes as minor. *See O'Donnell*, 551 F.2d at 1146-47 (*Switchmen's* test "is not a stringent one"); *Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985) (citing cases).

1. *Sensory Surveillance as Implied-In-Fact Condition to the Collective Agreement*

In *Detroit and Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 153 (1969) (*Shore Line*), the Supreme Court held that the scope of the status quo in a major labor dispute includes "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute."

Although *Shore Line* concerned a dispute that all sides agreed was a major dispute, its teaching applies to *all* railroad labor disputes—major or minor. The Supreme

Court's holding that the status quo in a major dispute includes employment terms established by past practice means that a railroad collective agreement includes *both* express terms and terms implied by past practice. *See Maine Central Railroad Co. v. United Transportation Union*, 787 F.2d 780, 782-83 (1st Cir.) (railroad's assertion that proposed action comported with past custom and practice was arguably correct and thus dispute was minor), *cert. denied*, 107 S. Ct. 169 (1986).

Relying on *Shore Line*, the district court concluded that both Rule G and its customary enforcement by sensory surveillance were implied terms of the collective agreement between BN and BLE. 620 F. Supp. at 170. The district court found that sensory surveillance by BN's supervisors had been the only regular method of Rule G enforcement for over forty years and that BLE had long acquiesced in this practice. There is ample evidence in the record to support this conclusion. Several BLE officials with long experience regarding BN's operating procedures so testified. Moreover, BN never disputed that sensory surveillance by BN's supervisors was the primary means of detecting Rule G violations before 1984.

The district court also found that BN's occasional use of sniffer dogs before 1984 did not rise to the level of custom and practice. This conclusion is also supported by the record. *See* note 4 *supra*.

Because Rule G enforcement is a mandatory subject of bargaining, and because the district court did not clearly err in finding that sensory surveillance was the customary means of detecting Rule G violations, I would uphold the court's conclusion that Rule G enforcement by sensory

surveillance was an implied condition of the collective agreement.

The district court further determined that the custom and practice of relying on sensory surveillance by BN's supervisors to detect Rule G violations arguably justifies any reasonable enforcement method based on "a modicum of evidence." 620 F. Supp. at 171. In the instant case, the court concluded that such an implied condition did not arguably justify BN's dog sniff program because engineers subjected to dog sniffs were selected at random, i.e., their selection to determine whether they had violated Rule G was not based on a "modicum of evidence." *Id.* at 171-72.

In my view, the district court's "modicum of evidence" rationale begs the question. The critical inquiry should not be whether an enforcement procedure is triggered by sufficient objective facts, but whether the parties to this labor dispute, by their conduct, can be said to have agreed to the challenged enforcement procedure. It seems to me farfetched to conclude that the BLE, by acquiescing in Rule G's enforcement by sensory surveillance of an employee's gait, breath, odor, slurred speech, or blood shot eyes, can be said to have agreed to allow BN to implement *any* procedure beyond sensory surveillance so long as the procedure is triggered by a "modicum of evidence."

The kind of sensory surveillance that BN's supervisors had employed in the past did not implicate the serious privacy intrusions posed by BN's use of sniffer dogs. I believe that it is incorrect to conclude that the union impliedly agreed to the current use of sniffer dogs just because "through custom and practice" it had for forty

years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance. Moreover, such sensory surveillance as employed by BN's supervisors entailed individualized suspicion whereas the use of sniffer dogs rests on group suspicion. The use of sniffer dogs is, in my view, a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute.

It may well be that the use of sniffer dogs is an appropriate response to BN's safety obligations. However, the merits of the procedure are not before us. I would, therefore, conclude that BN's use of sniffer dogs is not *arguably* justified by the implied provision in the collective agreement that BN may enforce Rule G by sensory surveillance.

2. *The Omitted Case Doctrine*

The Supreme Court first referred to the "omitted case" doctrine in *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. at 723. An omitted case refers to a "claim founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*, e.g., claims on account of personal injuries." *Id.* (emphasis added). If an omitted case is involved, the dispute may be characterized as a minor dispute if it is arguably justified by an implied-in-law provision in the collective agreement.

In rejecting BN's omitted case argument, the district court noted that an omitted case arises only in a minor dispute, and concluded that, because BN's use of dog sniffs was a major dispute, it could not be an omitted case. 620 F. Supp. at 172. This application of the omitted case doctrine is inappropriate because it assumes the result.

As is true of all agreements, a collective bargaining agreement may include terms which, although omitted from the text of the agreement, are nonetheless part of the agreement because they are implied-in-law. Thus, it is necessary to determine whether the sniffer dog program, which is not covered by an express or implied-in-fact provision, is nonetheless arguably justified by an implied-in-law condition.[6]

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[6] We first considered the omitted case doctrine in *Railway Labor Executives' Association v. Atchison, Topeka and Santa Fe Railway Co.*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971). There Santa Fe obtained the ICC's approval to discontinue rail service on a certain line. The railroad, however, discontinued the service early, and the union sued for the prematurely displaced workers' lost wages. We held that the dispute was minor because it involved an interpretation of an omitted provision of the collective agreement.

We concluded that the collective agreement contained

> no specific provision for the payment of wages following discontinuance of a train. However, nothing in the agreements exclude such protection for the affected employees. Whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the "usage, custom, and practice" of the industry, or whether it was rejected following negotiation does not appear in the record and is a matter requiring the expertise of the Adjustment Board.

Id. at 996 (emphasis added).

Despite the broad language in *Atchison*, the omitted case doctrine should only apply to implied-in-law conditions (statutory obligations) and not to implied-in-fact conditions (custom and practice) or conditions deliberately omitted from the collective agreement during earlier negotiations. In *Elgin*, the Supreme Court described an omitted case as a "claim founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*,

(Continued on following page)

The obligations of the Railroad Safety Act of 1970, as amended, 45 U.S.C. § 431 et seq., and the 230 detailed pages of federal regulations pursuant to the Act, 49 C.F.R. §§ 209.1-236.838 (1985), are implied-in-law conditions of the collective agreement between BN and the BLE. Similarly, the provisions of several earlier acts dealing with railroad safety and their enforcing regulations are all implied-in-law omitted conditions of the collective agreement. *See, e.g.*, 45 U.S.C. §§ 1-43 (safety appliances and equipment on railroad cars and rail lines); and 45 U.S.C. §§ 61-66 (limitations on hours of service railroad employees).

Federal Railway Administration regulations specifically prohibit any BN employee from using or possessing any controlled substance on railroad property, 49 C.F.R. § 219.101(a)(1). But, there are no statutes or regulations that authorize or require the railroad to use sniffer dogs to detect employees who use or possess drugs while at

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e.g., claims on account of personal injuries." 325 U.S. at 728 (emphasis added). The Court's example in *Elgin* must refer to a railroad's statutory obligation to pay workers' compensation to injured employees under the Federal Employers' Liability Act. Therefore, the scope of the omitted case doctrine is narrower than a superficial reading of *Atchison* might suggest.

In addition, BN contends that *Atchison* holds that the omitted case doctrine applies *whenever* the dispute is over a matter not prohibited or sanctioned by a collective agreement. A narrower reading of *Atchison* is more consistent with the RLA. A holding that any dispute over a matter neither prohibited nor sanctioned by a collective agreement is a minor dispute would reduce the number of major disputes to a small handful and would largely vitiate the major dispute resolution procedures of the Act.

work. In short, there is total legislative and administrative silence on this subject. Thus, there is simply no implied-in-law condition that could arguably justify BN's sniffer dog program, and the challenged program, which is outside the ambit of the collective agreement, is a major dispute.

CONCLUSION

The permissible breadth of the measures that an employer may take to ensure that abuse of controlled substances does not impair an employee's work performance is a relatively novel and controversial issue. In this case, resolution of the issue is made more difficult by the intricacies of the Railway Labor Act, the silence of the express terms of the collective agreement on such matters, and a recognition of the havoc that an intoxicated railroad employee can wreak.

BN's use of sniffer dogs to enforce Rule G concerns "working conditions" and its primary impact may affect the job security of BN's employees. Therefore, the district court correctly concluded that the program is a mandatory subject of bargaining.

The district court also correctly concluded that the collective agreement included an implied-in-fact provision based on custom and practice that permitted BN to enforce Rule G through sensory surveillance. Moreover, I agree with the district court, but for different reasons, that this implied provision does not arguably justify a sniffer dog enforcement program. Finally, the Railroad Safety Act and the regulations promulgated thereunder offer no support for the proposition that the sniffer dog program is arguably justified as an implied-in-law condition under the

omitted case doctrine. Accordingly, the district court correctly held that the union's objections to the sniffer dog program presented a major dispute under the RLA. Thus, I vote to affirm the district court's issuance of an injunction enjoining the program.

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IN THE

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OCTOBER TERM, 1987

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Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The decision below has been instrumental in fostering a conflicting body of case law with respect to the treatment of employee drug testing programs under the Railway Labor Act ("RLA"). The resulting confusion has the practical effect of inhibiting two industries with critical public safety obligations—railroads and airlines—from taking effective measures against employee drug abuse. The brief in opposition ("Opp. Cert.") of respondent Brotherhood of Locomotive Engineers ("BLE") neither reconciles the conflicting lower court decisions nor diminishes the significant impact the Ninth Circuit's holding will have on all collectively-bargained relationships.

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BLE seeks to dispel the patent conflict between the Eighth Circuit decision [1] and this case with the bare assertion that the record before the Eighth Circuit was "far different from that before the Ninth Circuit . . . ." Opp. Cert. at 24-25. BLE's failure to offer any support for that assertion is eloquent testimony that no such differences in fact exist.

The Eighth and Ninth Circuits reviewed the same drug testing program instituted by the same railroad to enforce the same safety rule with the same history of prior enforcement. As the Iowa district judge noted: "From reviewing the [Montana] decisions, it is clear to this Court that the factual and legal issues presented in them are very similar to those now before this Court." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 642 F. Supp. 41, 44 (N.D. Iowa 1985) (*"BMWE"*), *aff'd in part and rev'd in part*, 802 F.2d 1016 (8th Cir. 1986).

The drug testing program at issue in both cases was the company-wide program established by petitioner Burlington Northern Railroad Company ("BN"); BN does not have different programs for members of different unions. BN's program was designed to implement safety Rule G, which, similarly, applies to "employees" and does not differentiate among them based on union membership. Thus, the evidence introduced in each of the two cases was not limited to any particular union or region, and the references to past practices drew no distinctions between unions.[2]

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[1] *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 802 F.2d 1016 (8th Cir. 1986), Appendix ("App.") at 36a.

[2] *See, e.g.*, Ninth Circuit Opening Brief of BLE at 19 (references to past practices involving engineers, other crew members, and employees unidentified as to union or position); App. at 87a (list of employees tested prior to November 1984).

Indeed, because the district court case in the Eighth Circuit began after district court proceedings were already under way in the Ninth Circuit case, the parties in one case made their record by using testimony from the other. For example, the direct testimony and cross-examination of a BLE official in the Montana case were introduced in the Iowa district court as evidence of past practices.[3] Similarly, the key evidence describing BN's prior drug testing efforts was introduced in substantially similar form in both proceedings.[4] Given the identity of the underlying facts and the near identity of the records, it is inconceivable that the two courts could have reached different results had not conflicting legal reasoning been employed.

Analysis of the opinions confirms this point. The Eighth Circuit reasoned that, where the railroad has a past practice of sensory observance of drug or alcohol impairment, the RLA authorizes use of "more refined" testing methods to confirm drug use. App. at 49a-50a. The Ninth Circuit, on the other hand, applied two wholly different legal theories. First, it asserted that BN's prior programs were based on "particularized suspicion" and that the disputed program was based on "generalized suspicion." The difference between these two legal categorizations—which struck the district court as immaterial—was found legally dispositive by the Ninth Circuit. *Id.* at 10a. Second, the Ninth Circuit held that, in the absence of an express agreement, private employees would be presumed not to have agreed to any term of employ-

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[3] *See* Transcript of Iowa district court hearing held June 25, 1985 at 139-40 (discussing admission of Pelava Affidavit) *and BMWE*, 642 F. Supp. at 49 (admitting Pelava's Affidavit together with transcript of cross-examination).

[4] *Compare* Affidavit of Charles J. Bryan at ¶ 3, App. at 82a-83a (Montana proceedings; describing BN's Rule G past practices) *with* Affidavit of Tom C. Whitacre at ¶ 6 (Iowa proceedings; providing identical information on Rule G past practices).

ment that provides less protection for privacy interests than the Fourth Amendment. The Ninth Circuit applied this novel legal theory to avoid facts that led the Eighth Circuit to an opposite result. *Id.* at 11a.[5]

The conflict between the Ninth and Eighth Circuits is apparent to other courts. In *Railway Labor Executives' Association v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. Apr. 25, 1988), a decision rendered since the filing of this petition, the Third Circuit freely acknowledged that the legal principles underlying the decisions on RLA drug testing are hopelessly confused:

> Three other courts of appeals have considered the same or similar drug-testing issues under the RLA, with varying results and rationales.
>
> * * * *
>
> The absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts.

Id. at 11, 15.

The Third Circuit went on to conclude that Conrail's addition of a drug screen to the urinalysis portion of routine employee physical examinations represented a major dispute under the RLA.[6] The Third Circuit thereby put

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[5] That the Ninth Circuit's decision rests on that court's own legal theories is also evident from the procedural setting in which it was rendered. The Ninth Circuit reversed without holding the district court's findings of fact to be clearly erroneous, confirming that a difference in legal analysis, not the state of the record, controlled the result.

[6] The Third Circuit based its decision on a rationale not previously articulated by any other court. It looked to past practices to determine whether there had been an agreement on certain specific matters, such as the particular drug test to be used, rather than on the broader issue of drug testing itself. *Conrail*, No. 87-1289 at 18. Like the Ninth Circuit in this case, the Third Circuit reached its decision without guidance on the need to reconcile public safety issues with the requirements of the collective bargaining process.

itself into conflict with the Seventh and Eighth Circuits, which reviewed identical questions as to drug screening in such examinations. *See Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad*, 802 F.2d 1016 (8th Cir. 1986), App. at 36a. The conflicts among appellate courts on even these relatively simple facts illustrates that different results with respect to employer drug testing are being driven not by facts but by philosophical differences.

Moreover, the addition of two new court of appeals decisions since the filing of the petition confirms the pressing need for guidance.[7] While giving lip service to the "arguably justified" standard under the RLA, the courts of appeals are actually developing a body of case law based on fine distinctions as to what level of suspicion justifies drug testing. Under the cover of such legal principles, lower courts are routinely disposing of issues that properly belong before arbitrators.

As the collective decisions of the courts of appeals indicate—and as at least one court of appeals has candidly acknowledged—the legal principles being applied in drug testing cases are in disarray. Even with respect to a single program, the federal courts are not reaching the same result. Moreover, the courts of appeals are just now facing what promises to be an onslaught of cases involv-

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[7] In *International Brotherhood of Teamsters, Local 19 v. Southwest Airlines*, No. 87-1085 (5th Cir. Apr. 27, 1988), after reviewing both the Eighth and Ninth Circuit decisions with respect to BN, the Fifth Circuit recently concluded that Southwest's program "includes all of the elements found to constitute 'major' disputes by the Ninth Circuit in conjunction with a less extensive history or [sic] Rule G enforcement." Slip op. at 2933. This second new decision, which was based on a misconception of the Ninth Circuit record, thus held that Southwest's implementation of a mandatory drug and alcohol testing program constituted a major dispute.

ing private employer drug testing issues. Direction from this Court is therefore needed to establish uniform legal principles in this area.

II

BLE has virtually ignored the Ninth Circuit's second holding—its conclusion that Fourth Amendment principles govern the interpretation of private sector collective bargaining agreements. *See* App. at 11a. That holding alone would warrant review of this case, because it threatens to bar employer-instituted drug testing programs throughout the private sector. As the Equal Employment Advisory Council cogently explains in its brief *amicus curiae*, the impact of this Fourth Amendment theory "could interfere directly with important, ongoing substance abuse testing programs not only as to railroads and airlines, but throughout American industry, both in organized and unorganized workplaces." [8] That far-reaching impact demands prompt correction by this Court.

III

BLE's attempt to cast this case as presenting "a relatively simple labor issue," *see* Opp. Cert. at 28, vastly understates the effect of relegating drug testing programs to the RLA's major dispute resolution procedures. Unlike employers governed by the National Labor Relations Act, rail and airline carriers are required to undertake protracted and purposefully drawn out procedures before implementing proposed programs. *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238, 246 (1966). Moreover, it is far from clear that any effort to protect the public safety through RLA negotiations on reasonable employee drug testing programs would ever succeed.

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[8] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of the Petition for a Writ of Certiorari (filed May 2, 1988) at vii.

BN is not alone in facing arguments that the RLA poses a significant barrier to addressing the problem of employee drug abuse. Conrail, Norfolk & Western Railway, Chicago & North Western Transportation Company, and Southern Pacific Transportation Company have all been subject to litigation challenging their drug and alcohol testing programs.[9] The breadth of the rail industry's support for permitting carriers to implement reasonable employee drug testing programs without RLA negotiations is demonstrated by the appearance as *amicus curiae* of the National Railway Labor Conference, an organization that represents ninety percent of the industry.[10] The Nation's air carriers have also appeared here to emphasize the importance of not burdening drug testing programs with RLA major dispute procedures.[11] Indeed, three members of that industry—Southwest Airlines, Trans World Airlines, and Alaska Airlines—have already faced RLA challenges to their testing programs.[12] The persistence and vigor with which both rail and air

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[9] *Railway Labor Executives' Association v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. April 25, 1988); *Railway Labor Executives Association v. Norfolk & Western Railway*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees v. Chicago & North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3682 (1988); *International Association of Machinists & Aerospace Workers, Lodge 19 v. Southern Pacific Transportation Co.*, 105 L.R.R.M. (BNA) 2046 (E.D. Cal. 1980).

[10] Brief for the National Railway Labor Conference as Amicus Curiae in Support of the Petition (filed April 29, 1988).

[11] Brief of the Airline Industrial Relations Conference and the Air Transport Association of America as Amici Curiae Supporting Certiorari (filed April 29, 1988).

[12] *See International Brotherhood of Teamsters, Local 19 v. Southwest Airlines*, No. 87-1085 (5th Cir. Apr. 27, 1988); *International Association of Machinists & Aerospace Workers v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987); *Airline Pilots Association International v. Alaska Airlines*, No. C87-353R (W.D. Wash. Aug. 11, 1987), *appeal docketed*, No. 87-4167 (9th Cir. Sept. 9, 1987).

carriers have pursued safety-oriented drug testing confirms the importance of the issue to those industries.

These carriers have taken the position that their collective bargaining agreements permit—and public safety concerns compel—effective measures against employee drug abuse without interminable, possibly fruitless discussions and without compromising effective programs to obtain employee concurrence. While BLE touts union-approved programs as an alternative,[13] they plainly do not offer such an easy solution. BN supports the use of employee assistance programs as a correlative of drug use testing—and has made such a program available to its employees.[14] However, the limited effectiveness of such programs is demonstrated by one simple fact: as of the time this case went to trial, only *one* BLE member had volunteered for participation in BN's current peer referral program.[15] As recent events demonstrate, a railroad employee whose drug impairment causes an accident is the least likely person to come forward voluntarily for rehabilitation.[16] Thus, exclusive reliance on peer referral

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[13] BLE focuses on CSX Transportation, *see* Opp. Cert. at 2, 29, which has determined for its own business reasons to obtain union approval before implementing a drug testing program. However, that carrier is plainly an exception to rail and airline industry practice. The same is true of the other voluntary carrier effort BLE commends, the more limited program known as "Operation Red Block" adopted by Union Pacific Railroad.

[14] BN's employee assistance program now includes peer referral, counseling and rehabilitation, as well as a by-pass provision under which disciplinary consequences for Rule G violations can be deferred. *See* App. at 86a. These provisions were initiated following informal discussions with employee organizations.

[15] App. at 84a. Indeed, even if members of all employee organizations are considered, only *eight* persons had volunteered for the current program. *Id.*

[16] In recent hearings, Congress was told: "I have never known anybody to turn themselves in" by Ricky L. Gates, the Conrail engineer who was involved in the fatal January 4, 1987 Amtrak-

and bypass programs, without a testing component, are not only ineffective but also deprive the industry of information needed to understand and address the cause of rail accidents.

BLE would have this Court believe that drug testing of transportation employees is an issue reasonable parties could readily resolve in the course of brief discussion or negotiation. That assertion is belied by the volume of litigation on this important topic and the conflicting results it has engendered in the absence of guidance from this Court. More important, BLE suggests that the employee drug use problem in the rail industry is not of sufficient magnitude to be of concern to the public or this Court, but should be left to the vagaries of the bargaining process. The Court should reject this contention and provide the lower courts and the industry with guidelines to assure that the public interest is not extinguished in the labor relations process.

Conrail collision. Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Comm. on Commerce, Science and Transportation, 100th Cong., 2d Sess. at 100 (1988) (statement of Ricky L. Gates); *see also 24 Injured as Train Derails South of Philadelphia; Safety Board to Question Amtrak Switch Operator Who Fled Crash Site in Northeast Corridor*, Washington Post, Jan. 30, 1988, at A3.

CONCLUSION

For all of these reasons and for the reasons stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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No. 87-1631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") respectfully moves this Court for leave to file a brief as amicus curiae in support of the Petitioner, Burlington Northern Railroad Company, in this case. The brief is conditionally filed herewith in accordance with Rule 36.1. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including individual employers as well as several trade associations which themselves have hundreds of corporate members. The members of EEAC are committed firmly to the principles of nondiscrimination and equal opportunity in employment.

2. Many of the Council's members, and the constituents of its trade association members, are deeply concerned about the problem of drug and alcohol abuse in the nation, and have implemented programs addressing substance abuse in their workplace. Often, these programs include drug and alcohol testing for prospective and/or current employees. In a number of instances, members are government contractors who are required or strongly encouraged by federal contracting agencies to assure that employees working on government projects are drug free.[1]

3. Many members also have collective-bargaining relationships with unions representing their employees, which are regulated under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982) ("RLA"), or more frequently the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1982) ("NLRA"). In some in-

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[1] *See* Mandatory Guidelines for Federal Workplace Testing Programs, *published by* the National Institute on Drug Abuse, Department of Health and Human Services, 53 Fed. Reg. 11970, 11975 ¶ 21 (April 11, 1988) ("any agency may require a contractor to test its own employees following the procedures in the Guidelines by making the requirement a term or condition of the contract.")

stances, these collective bargaining agreements address the issue of substance abuse, including drug and alcohol testing. In other instances, substance abuse programs are carried out lawfully among organized workers, although not addressed directly in applicable contracts.

4. The issues presented in the petition for a writ of certiorari are extremely important to the nationwide constituency which EEAC represents. The Ninth Circuit majority ruled that with regard to urine testing programs, a private railroad worker has the same privacy interest as does a government employee under the Fourth Amendment to the United States Constitution. The Court held further that it cannot be assumed, in the absence of express contractual provisions authorizing urine testing, that private railway workers would grant their employer authority to invade their privacy in ways the government could not. (Pet. App. 11a).[2]

The Ninth Circuit's holding in this regard represents an unprecedented extension of constitutional principles to private, non-governmental action. It suggests incorrectly that private employers are subject in their drug testing and related programs to federal constitutional limitations with regard to personal privacy and search and seizure. If allowed to stand, this ruling could interfere directly with important, on-going substance abuse testing programs, not only as to railroads and airlines, but throughout American industry, both in organized and unorganized workplaces.

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[2] "Pet. App." references are to the Petitioner's Appendix.

In the collective-bargaining context, the ruling also is inconsistent with established principles under both the RLA and NLRA. Even assuming, *arguendo*, that private employees enjoy an expectation of privacy approaching that of government employees, it is well-established that in the course of negotiating and administering collective-bargaining agreements, unions may explicitly or implicitly waive many of their members' rights or privileges. Especially considering that the General Counsel of the National Labor Relations Board has announced that she will regard implementation of a substance abuse testing program for job applicants and current employees as a mandatory subject of bargaining under the NLRA, it is to be anticipated that there have been, and will continue to be, varying degrees of waivers of privacy interests as to drug testing in collective-bargaining throughout the nation. It is clear, therefore, that the Ninth Circuit's ruling could interfere with ongoing labor relations agreements and practices with regard to substance abuse testing.

5. Because of its interest in the issues associated with substance abuse, EEAC, through a closely related foundation funded by its members, sponsored the preparation of a monograph titled "Drug and Alcohol Abuse: A Guide to the Issues" by J. Michael Walsh, Ph.D. and Stephen C. Yohay, published in 1987 by the National Foundation for the Study of Equal Employment Policy. More generally, as a broadly-based national organization, EEAC has filed many amicus briefs with this Court. Some of these cases include *Watson v. Fort Worth Bank & Trust* (No. 86-6139) (decision pending); *School Board of Nassau County v. Arline*, 107 S.Ct. 1123 (1987); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

6. EEAC has sought and received permission from this Court to file briefs in other cases concerning nondiscrimination in employment. *See, e.g., Reichhold Chemicals, Inc. v. Cassino*, 108 S.Ct. 785 (*denying cert.* but granting EEAC's motion to file brief in support); *Marino v. Ortiz*, 108 S.Ct. 586 (1988); *State of Florida v. Long*, No. 86-1685, *cert. granted*, 56 U.S.L.W. 3206 (1987); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

7. The written consent of counsel for the Petitioner, Burlington Northern Railroad Company, has been filed with the Clerk of the Court. Counsel for Respondent was contacted, and indicated he would not consent to the filing of this brief, thereby necessitating this motion.

WHEREFORE, the Equal Employment Advisory Council respectfully moves that it be granted leave to file the accompanying brief amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case filed by Petitioner, Burlington Northern Railroad Company. This brief is filed contingent upon the granting of the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth fully in the accompanying motion.

STATEMENT OF THE CASE

The case arises out of the Burlington Northern Railroad's ("BN") change in the procedure used to detect violations of its Rule G, which provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property, is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, responses or safety. (Pet. App. 15a).

An employee on duty found to be in violation of this rule was subject to suspension or discharge. Although this rule or similar ones have been in effect at BN (and in the industry) for more than 40 years, the collective-bargaining agreement between BN and the Brotherhood of Locomotive Engineers ("BLE") did not address the methods of detecting violations of the rule or enforcing its provisions.

Until 1984, BN had primarily relied upon supervisors to detect, through sensory observation, whether employees appeared to be intoxicated. If a supervisor detected alcohol or drug use by an employee, the individual was asked to take a urine test. Such a request was not made, however, unless there was sufficient evidence to establish "reasonable suspicion" to believe that the employee had violated Rule G. If the employee refused to be tested, he would not be disciplined for the refusal, but he could be disciplined for a Rule G violation on the basis of the supervisor's observation of his intoxication.

In 1984, BN suffered two major train accidents, in which several individuals were fatally injured. In one case, investigation revealed alcohol abuse by an engineer as a possible cause, and in the other, toxicology studies revealed traces of marijuana in the crew members' body fluids. (Pet. App. 16a). Thereafter, BN announced that it would require blood or urine testing following a human factor accident or operating rule violation. Under BN's rules, an employee who refuses to submit to a mandatory urinalysis after being involved in a human factor accident or operating rule violation is subject to discipline for insubordination.

BLE filed suit to enjoin the program. The federal district court found that the urine testing program was "arguably justified" under the terms of an "implied agreement extant between the parties." (Pet. App. 19a). The Court held, accordingly, that it lacked jurisdiction, because the dispute was a "minor" one, appropriate for arbitration before the National Railway Adjustment Board, pursuant to 45 U.S.C. § 153, First (i) of the RLA.

On review, the Ninth Circuit majority held that because the mandatory testing program could result in an employee's discharge, it is a mandatory subject of bargaining under the RLA. The majority then held that the dispute over urine testing could not be a "minor" dispute, largely because it could not be implied that the BLE members would have implicitly agreed to waive the expectations of privacy which, the majority said, they would have enjoyed had they been government employees. Thus, applying its analysis in *Railway Labor Executives' Ass'n v. Burnley*,

839 F.2d 575 (9th Cir. 1988),[1] the Court held that were BN's program operated by a government employer, it would have violated the Fourth Amendment because, in the majority's view, it required testing based on generalized, rather than particularized, suspicion. The majority then reasoned that BN's employees, although employed by a private employer, enjoy the same expectations of privacy as do government employees under the Fourth Amendment. The majority then "decline[d] to assume that BLE members implicitly granted BN the authority to invade their privacy in ways the government could not." (Pet. App. 11a). Accordingly, the district court's decision was reversed.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit majority below held that private railroad[2] workers have the same expectation of privacy as do government employees under the Fourth Amendment. The petition should be granted to reverse this determination, for the Fourth Amendment is directed at *governmental* intrusions into privacy, and not at agreements between private parties. *United States v. Jacobsen*, 466 U.S. 109, 133-14 (1984). The ruling injects confusion into the circumstances under which private employers may require job applicants and employees to undergo drug and alcohol tests. Given the importance of this issue, private employers need to have the issue clarified, and their freedom from constitutional limitations affirmed.

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[1] A petition for a writ of certiorari is pending in that case as well (No. 87-1555).

[2] The decision also applies, by implication, to airlines.

The ruling below also contravenes settled federal labor law under both the RLA and NLRA that a union may implicitly waive its members' statutory rights. Indeed, under the RLA, there is a split in the circuits on the precise issue presented by the petition, for the Eighth Circuit has held that such a dispute is a "minor" one under the RLA. *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986).

Under the NLRA, implied waivers of statutory bargaining rights may be found where a union fails to request bargaining following an employer's notice of intent to alter terms or conditions of employment,[3] or where a union agrees to broad management rights language in a collective bargaining agreement.[4] The General Counsel of the NLRB now views implementation of a drug testing program as a mandatory subject of bargaining. Thus, the issue will be increasingly addressed in contract negotiation and administration, so that waivers of the bargaining right are to be expected as an inevitable consequence of strategic labor relations choices. To hold that such a waiver could never be implied is to say, contrary to federal labor policy, that as a practical matter, drug testing is not a proper bargaining subject. Thus, the decision below creates immense confusion on a number of important issues of national concern. For this reason, this Court should grant the petition and review the decision below.

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[3] *See, e.g., Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975).

[4] *See, e.g., Leroy Machine Co., Inc.*, 147 NLRB 1431 (1964).

REASONS FOR GRANTING THE PETITION

I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION CONTRAVENES THE PRINCIPLE THAT CONSTITUTIONAL LAW DOES NOT GOVERN PRIVATE ACTION, AND THUS INJECTS UNCERTAINTY INTO PRIVATE EMPLOYERS' SUBSTANCE ABUSE TESTING PROGRAMS

As set forth in Judge Alarcon's dissent (Pet. App. 13a), the majority below evaluated whether BN's testing practices were arguably permitted under the parties' implied collective bargaining agreement by first determining whether the post-incident testing procedures prescribed by BN could be undertaken by a government employer. The majority then concluded that if conducted by the government, the tests would violate the Fourth Amendment. Next, the majority held that the post-incident testing procedure is not even arguably justified by the collective bargaining agreement, because it could not be assumed that the BLE members would implicitly grant BN the authority to invade their privacy in ways the government could not.

As Judge Alarcon correctly described it, this was an unexplained, "radical departure from fourth amendment analysis" (Pet. App. 14a), for it is well-settled that the Fourth Amendment is directed at governmental intrusions into privacy interests, and not at agreements between private parties. *United States v. Jacobsen*, 466 U.S. 109, 113-14(1984). *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-51 (1974); *Greco v. Halliburton Co.*, 674 F. Supp. 1147, 1451 (D. Wyo. 1987) (private drug test concurrent with DOT-required physical exam is not state action).

Private employers throughout the nation have fashioned their substance abuse testing programs on the basis that the circumstances under which they may require employees and job applicants to undergo testing are not limited by federal constitutional concerns. There has been no reason for private employers to be concerned that their employees would be deemed to have an expectation of privacy comparable to government employees. Other considerations, such as state law,[5] collective-bargaining agreements, and employee relations concerns may have operated alone or in combination to limit the circumstances under which employers may require drug or alcohol tests. But there has been no reason for the Fourth Amendment, or a constitutional level of privacy expectations, to be among those concerns.

Thus, the Ninth Circuit's decision at a minimum creates uncertainty where the law appeared to be well-settled. It leaves private employers unclear as to the circumstances under which they may require applicants and current employees to undergo drug and alcohol tests. Moreover, there is nothing in the Ninth Circuit decision which distinguishes between organized and unorganized employees as to the expectations of privacy which the court believes private employees enjoy. Thus, the decision creates confusion as to both union and non-union workforces,

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[5] A number of states have enacted statutes which, to one degree or another, limit the circumstances under which private employers may require applicants or current employees to submit to a drug or alcohol test. *See, e.g.*, Conn. Pub. Act No. 87-551 (1987); Iowa Code § 730.5 (1987); 1987 La. Act 464; Minn. Stat. § 181.950 *et seq.* (1987); Mont. Code § 39-2-304 (1987); R.I. Gen. Laws § 28-6.5-1 (1987); Utah Code § 34-38-1 (1987); and 1987 Vt. Act § 61.

raising questions as to whether the expectation of privacy which the Ninth Circuit perceives may be enforced in arenas other than collective-bargaining.

The confusion is compounded by the fact that what constitutes adequate cause for government employers to conduct drug or alcohol tests under the Fourth Amendment is itself an unresolved question. This Court is about to address the question in the limited context of tests for customs agents in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879). It is not at all clear, however, whether that decision will clarify what constitutes cause in the broad range of circumstances in which testing may be required by a private employer.

Although this Court has not yet spoken to the issue directly, it has become widely accepted in private industry that drug or alcohol testing following an industrial accident in all likelihood will satisfy any reasonable requirement for cause, regardless of the source of the requirement, and virtually without regard to how the concept of "cause" is defined. But insofar as the majority below has relied upon its decision in *Railway Labor Executives' Association v. Burnley*, the majority below has called this fundamental issue into question as well.

Many employers test all job applicants, and test current employees where there is some cause, or where suspicion justifies doing so. Other employers test on a random basis, often but not necessarily limiting the program to those employees who perform sensitive jobs, such as those which place employees in a position to affect the safety or security of others. However, all private employers need to know the cir-

cumstances under which testing may be performed; thus, clarification of the ruling below is important. Moreover, it is crucial for this Court to reaffirm that private employers are not subject to Fourth Amendment limitations as to their substance abuse testing programs. Accordingly, the petition should be granted.

II. THE DECISION BELOW CREATES A SPLIT IN THE CIRCUITS UNDER THE RAILWAY LABOR ACT, AND IS INCONSISTENT WITH THE LAW UNDER THE NATIONAL LABOR RELATIONS ACT GOVERNING COLLECTIVE-BARGAINING OUTSIDE THE RAIL AND AIRLINE INDUSTRIES

A. The Eighth Circuit Has Held That Under The RLA, Burlington Northern's Post-Accident Testing Program Is A "Minor" Dispute

The identical question ruled upon below was decided differently by the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986). There, the court found that BN's unilateral implementation of the identical urine testing policy did not amount to a "major" dispute under the RLA, and that accordingly, the railroad was not required to bargain with the union prior to implementation. In reaching its decision, the court relied on the fact that employees had been governed by Rule G for many years. It concluded that the parties had acquiesced in certain detection and investigative methods under the rule, and that requiring employees involved in accidents to undergo urine testing amounted only to a refinement of those methods. The court also found that since the railroad had long required employees to undergo periodic medical examinations to assure fitness for duty, without opposition from the union,

the addition of a drug screen was arguably justified by past practice.

This decision reveals a split in the circuits on the important issues under the RLA presented by the petition; this alone provides reason for granting the petition. The Eighth Circuit decision also confirms that apart from whether the court below could properly find acquiesence as a factual matter, a waiver as to drug testing objections may be implied in the appropriate circumstances.

B. Under The NLRA, A Union May Impliedly Waive Its Members' Objections To Substance Abuse Testing

The NLRB has long recognized that a union may waive its statutory rights to bargain over changes in terms and condition of employment. This can occur by inaction (*i.e.*, failing promptly to request bargaining in response to receiving timely notice of an employer's plan to alter a term or condition of employment),[6] or by agreement to a contractual revision or management practice which arguably gives the employer the right to take the action in question.[7]

For example, in *Medicenter, Mid-South Hospital, supra*, the employer gave the union notice of its intent to require employees to submit to polygraph examinations. The union protested, but did not bar-

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[6] *See, e.g., Clarkwood Corp.*, 233 NLRB 1172 (1975); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975); *Coppus Eng'r Corp.*, 195 NLRB (1972); *Triplex Oil Refinery*, 194 NLRB 500 (1971). *See also NLRB v. Alva Industries, Inc.*, 369 F.2d 310 (8th Cir. 1966).

[7] *See, e.g., Leroy Machine Co., Inc.*, 147 NLRB 1431 (1964).

gain, although the employer was ready to do so. The NLRB found that the union had waived its right to bargain over the decision. In *Leroy Machine Co., supra,* the NLRB found that requiring employees to submit to a physical examination constituted a mandatory subject of bargaining. Nevertheless, the Board found that the union had waived its right to bargain over the implementation of this policy because it had agreed to a management-rights clause which provided, *inter alia,* that the employer had the "sole right to . . . determine the qualifications of employees." This language, the Board ruled, gave management the right unilaterally to require employees to take physical examinations.

The General Counsel of the NLRB announced in a September, 1987 memorandum to the NLRB's Regional Directors that she will regard implementation of drug and alcohol testing, both for job applicants and current employees, as a mandatory subject of bargaining.[8] The memorandum also states that the General Counsel will take the position that management rights clauses in collective-bargaining agreements will not be construed as waivers of the bargaining right.

The General Counsel's position in this regard, while to date not addressed in a decision by the NLRB, assures that in organized workplaces, the issue of drug testing will be placed squarely in the collective-bargaining arena. Depending on the interplay of the numerous factors which govern the decisions which

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[8] NLRB General Counsel's Memorandum GC 87-5 (September 8, 1987), *reprinted in* BNA Daily Labor Report, D-1 (September 24, 1987).

unions and employers make in negotiating and administering labor agreements, it may well be that a union decides to waive, either explicitly or implicitly, the employees' objections to a drug testing program. To hold that such a waiver could never be implied is to say, in a real sense, that the matter is not one open to collective-bargaining. Such a result plainly is inconsistent with settled labor law, and would contravene federal labor policy expressed in the NLRA favoring the voluntary adjustment of labor-management disputes. *See Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, —— F.2d —— (3d Cir. Apr. 25, 1988).

CONCLUSION

For these reasons, and those expressed by Petitioner, EEAC respectfully submits that the petition should be granted.

Respectfully submitted,

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No. 87-1631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The National Railway Labor Conference represents most of the nation's Class I railroads in national collective bargaining and in regard to various other matters involving the Railway Labor Act. Because this case presents issues concerning the application of that Act that are of large importance to the railroad industry, this *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.1.

STATEMENT OF THE CASE

1. *The Statutory Framework.* This case arises under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* Under § 3 First (i) of that Act, "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" may be submitted by either party to the National Railroad Adjustment Board ("NRAB") if the dispute is not adjusted through the grievance procedures established by the carrier. 45 U.S.C. § 153 First (i).[1] Such disputes commonly are referred to as "minor" disputes, in accordance with terminology adopted by this Court in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945), on rehearing, 327 U.S. 661 (1946). The arbitration remedy thus provided for minor disputes is mandatory and exclusive. The courts do not have jurisdiction to decide such a dispute,[2] and a union may not lawfully strike over such a dispute, either before or after the decision of the adjustment

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[1] The NRAB is composed of four divisions, each of which has a membership divided equally between those "selected by the carriers" and by "the national labor organizations of the employees." 45 U.S.C. § 153 First (h). In the event of a deadlock, a neutral "referee" agreed upon by the members of the division or appointed by the National Mediation Board sits with the division so as to make an award. 45 U.S.C. § 153 First (l). The "findings and order of the divison" are "conclusive on the parties," subject to limited judicial review on grounds specified in 45 U.S.C. §§ 151 First (p) and (q). See, *e.g.*, *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89 (1978). A carrier and a union also may establish special boards of adjustment, or so-called "Public Law Boards," to decide such disputes in lieu of the NRAB. 45 U.S.C. § 153 Second. Those alternate adjustment boards generally consist of a carrier member, a union member, and a neutral member designated by the National Mediation Board.

[2] See, *e.g.*, *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972).

board.[3] A carrier ordinarily may implement its interpretation prior to the decision of the adjustment board,[4] but if found to be wrong, the "Board shall make an order, directed to the carrier, to make the award effective" which may include reinstatement and "a requirement for the payment of money" to compensate the employee for lost wages or other monetary loss caused by the carrier's action found to be erroneous. 45 U.S.C. § 153 First (o).

Such minor disputes are to be contrasted with so-called "major" disputes in which a party to a collective bargaining agreement seeks to change that agreement. Section 6 of the RLA requires a carrier or union to give "written notice of an intended change in agreements affecting rates of pay, rules, or working conditions," 45 U.S.C. § 156, and the Act further provides for conferences, mediation by the National Mediation Board and, at the discretion of the President, investigation of the dispute and recommendations for a settlement by an emergency board. See, *e.g.*, *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). Those procedures have been characterized by this Court as "long and drawn out," *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), as "almost interminable," *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969), and as "virtually endless," *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, —— U.S. ——, 55 U.S.L.W. 4576, 4580 (1987). While a major dispute is working its way through those procedures the parties are required to maintain the *status quo*, *Shore Line*, *supra*. But once they are exhausted without

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[3] See, *e.g.*, *Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957) (before); *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963) (after).

[4] See, e.g., *Railway Labor Executives* v. *Norfolk & Western Ry.*, 833 F.2d 700, 708 (7th Cir. 1987); *Brotherhood of Maintenance* v. *Burlington Northern*, 802 F.2d 1016, 1021-1022 (8th Cir. 1986); *Broth. of Loco. Eng.* v. *Boston & Maine Corp.*, 788 F.2d 794, 797 n.1 (1st Cir. 1986), *cert. denied*, 55 U.S.L.W. 3232 (1986).

agreement being reached, the parties may resort to self help including a strike of the carrier involved in the dispute and secondary picketing of any or all other railroads, *Burlington Northern, supra.*

Although the foregoing principles are well established by many decisions in addition to those cited, it is often necessary for a court to decide whether a particular dispute is major or minor in nature. Such litigation usually arises—as here— when a railroad claims that its actions accord with existing agreements so as to give rise to a minor dispute while a union contends that the carrier is attempting to impose unilaterally a new working condition, and thus to change its existing agreements, so as to give rise to a major dispute. "Confronted by such opposing characterizations of particular disputes, the courts of appeals have consistently ruled that if the disputed action of one of the parties can 'arguably' be justified by the existing agreement, or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial,' the controversy is within the exclusive province of the National Railroad Adjustment Board." *Local 1477 United Transportation Union* v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973). The "burden on the carrier to show such arguable justification is 'relatively light,'" *Ind. Fed. of Flight Attendants* v. *Trans World, Etc.*, 655 F.2d 155, 159 (8th Cir. 1981), and "when in doubt, the courts construe disputes as minor." *Bro. of Locomotive* v. *Atchison, Topeka & Santa Fe*, 768 F.2d 914, 920 (7th Cir. 1985).

The foregoing principles are applicable to disputes about a carrier's actions in regard to a matter as to which its written agreements are silent—referred to by this Court in *Elgin, J. & E. R. Co.* v. *Burley* as an "omitted case," 325 U.S. at 723—the situation that is involved here. We note, however, that the reasons for the general presumption in favor of arbitration—and thus for classfying a dispute as minor rather than major—

are particularly strong and fully justify the Court's reference in *Elgin, J. & E. R. Co.* v. *Burley* to an omitted case as one type of minor disputes for an adjustment board to decide, 325 U.S. at 723. See pp. 15-16 *infra*.

2. *The Proceedings Below.* Petitioner, Burlington Northern Railroad Company ("BN"), has an operating and safety rule denominated Rule G. It prohibits the use or possession by an employee of drugs or alcohol while on duty or on company property, and the reporting to duty by an employee while under the influence of drugs or alcohol. Pet. App. 74a-75a, 82a. Rule G was adopted many years ago and from time-to-time has been revised unilaterally by BN, it applies to all BN employees regardless of their union representative, and it has never been a part of a written collective agreement. Pet. App. at 75a, 82a-83a. Rule G does not prescribe or proscribe any particular means of detecting violations. BN introduced evidence that it historically has "used various means and procedures to enforce Rule G," which "always have been unilaterally promulgated by the carrier." Pet. App. at 82a-83a. Pursuant to that past practice, at least since 1978, the BN had utilized "post-accident testing including the use of urine, blood or breath test," without objection from Respondent, Brotherhood of Locomotive Engineers ("BLE"). *Ibid.*

In 1984, following two catastrophic train accidents, BN intensified its program for enforcing Rule G. Post-accident urine testing of employees may be required following major and certain minor human-factor accidents or when a BN supervisory official detects abnormal behavior on the part of an employee. Pet. App. at 75a, 77a-78a, 83a. The parties stipulated that this "post-accident testing policy applies only when there is a causal connection between the accident and an employee's responsibility for the accident," and "is not required when the cause of the accident is clearly related to other than employee error . . . ." Pet. App. at 78a.

Two unions representing BN employees objected to this intensified program for detecting violations of Rule G and brought litigation to enjoin its implementation: the Brotherhood of Maintenance of Way Employes ("BMWE"), which represents employees that maintain the BN's tracks, and the BLE, which represents BN's locomotive engineers. In the litigation brought by the BMWE, a district court held that its objections gave rise to a minor dispute for an adjustment board to decide and thus refused to enjoin implementation of the program in regard to employees represented by that union.[5] The Eighth Circuit unanimously affirmed that aspect of the district court's decision. *Brotherhood of Maintenance* v. *Burlington Northern*, 802 F.2d 1016, 1020-1023 (1986). In the litigation brought by the BLE, the district court similarly held that its objections gave rise to a minor dispute and refused to enjoin implementation of the program as to employees represented by that union.[6] In the decision now before this Court, however, the Ninth Circuit reversed over a dissent by Judge Alarcon. Pet. App. at 1a-31a, reported as *Broth. of Locomotive Eng.* v. *Burlington Northern*, 838 F.2d 1087 (1988).

The same panel of the Ninth Circuit on the same day by the same 2-1 majority also held that regulations issued by the Federal Railroad Administration ("FRA"), pursuant to the Federal Railroad Safety Act (45 U.S.C. §§ 421 *et seq.*), violate the Fourth Amendment to the Constitution insofar as they require that covered railroad employees undergo alcohol and drug testing (including urinalysis) if involved in major train accidents, certain impact accidents, or fatal incidents (49 C.F.R.

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[5] *Bro. of Maintenance* v. *Burlington Northern R.*, 642 F. Supp. 41, 46-48 (N.D. Iowa 1985).

[6] Pet. App. at 33a-35a, reported as *Brotherhood of Locomotive Eng.* v. *Burlington Northern*, 620 F. Supp. 173 (D. Mont. 1985).

§ 219.201(a)); or authorize the railroads to require such testing of employees involved in certain other reportable train accidents, incidents, or certain operating rule violations (49 C.F.R. §§ 219.301). *Railway Labor Executives' Ass'n* v. *Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. pet. pending*, No. 87-1555.

In the instant case, that panel majority did not see fit even to mention the earlier decision by the Eighth Circuit in the *BMWE* case holding that the identical BN post-accident testing program in connection with the identical Rule G is at least arguably justified by the BN's past practices in enforcing Rule G so that the BMWE's objections thereto gave rise to a minor dispute for an adjustment board to decide. Although recognizing that the dispute is minor if the BN's testing program "is 'arguably justified' by . . . a term implied by past practice" (Pet. App. at 9a), the panel majority minimized BN's past practice of unilaterally enforcing Rule G, and relied almost entirely upon its *Burnley* decision for its holding that the BN did not have even arguable justification for that program. In its view, "the focus of our inquiry—both under the fourth amendment and under an implied provision of a collective agreement—is the expectation of privacy of those who will be subject to urine testing." Pet. App. at 11a. It held, apparently as a matter of law, that "[a]lthough the source of the invasion is different, the privacy interest is the same," and "decline[d] to assume that BLE members implicitly granted BN the authority to invade their privacy in ways the government could not." *Ibid.*[7]

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association that includes almost all of the nation's class I railroads among its members.

[7] The court below further noted that its *Burnley* decision obviated arguments by the BN that the FRA regulations also provided support for its drug testing program. Pet. App. at 12a.

They employ over 90% of all railroad employees. Those members include the National Railroad Passenger Corporation (Amtrak), which provides intercity passenger service (for the most part over track maintained by other railroads and used also for freight operation). Other members (including BN) provide commuter as well as freight service, and most are solely freight railroads (although Amtrak passenger trains may operate over some of their tracks). NRLC represents member railroads in multi-employer collective bargaining with unions representing their employees (including the BLE), and in regard to a variety of other labor-management relations matters of interest to the railroads generally.[8]

This case involves an issue of critical importance to the railroad industry: whether a railroad that historically has enforced unilaterally safety rules prohibiting employees' on-duty alcohol and drug impairment can implement more effective detection measures without precipitating a major dispute under the RLA. There can be no question about the importance of railroad safety, or about the importance to railroad safety of preventing on-duty alcohol and drug impairment of employees operating trains or maintaining railroad equipment and tracks. Those matters obviously are highly important to the railroads as well as to railroad employees, passengers, shippers and members of the general public who may be affected by railroad accidents. And, of course, the prevention of on-duty alcohol and drug impairment by other employees also is important to the railroads.

As the record in this case reveals, Rule G for many years has "existed throughout the railroad industry"

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[8] Among other things, the Association of American Railroads generally represents the railroad industry in FRA matters, as in the *Burnley* case, while NRLC generally performs that role in matters related to collective bargaining or labor-management relations, as in this case.

(Pet. App. at 82a), and "BN's post-accident testing program is similar to programs being conducted on other railroads" (Pet. App. at 83a). The enforcement of Rule G has been the railroads' main line of defense against on-duty alcohol or drug impairment. The means or methods of enforcement traditionally has been left to the unilateral discretion of management, on other railroads as well as on BN.[2] Thus, the railroads have been able to adapt those means or methods of enforcement from time-to-time in the light of the seriousness of the problem and/or technological developments such as improved testing methods or techniques, without previously invoking the "almost interminable" major dispute procedures of the RLA in an effort to reach agreement with the unions —which in any event could lead to strikes if no agreement is reached.

The decision below threatens to interfere with that desirable flexibility of approach in enforcing Rule G, and for that reason, among others, its reversal is important to the NRLC and member railroads in addition to the BN. The importance of that decision transcends whatever this Court may do with the *Burnley* case, and thus the instant petition should be granted whether the petition in that case is granted or denied. Even if this Court should review and reverse the *Burnley* decision, as NRLC believes should be done, that will neither suffice to contain the railroads' problems with alcohol and drug impairment nor correct the Ninth Circuit's erroneous interpretation of the RLA.

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[2] As on the BN, the carriers generally have determined unilaterally the manner in which Rule G is to be enforced. CSX Transportation ("CSXT"), however, has entered into agreements for drug and alcohol testing with several of its unions and does not intend unilaterally to impose such testing. CSXT is concerned with preserving a carrier's right unilaterally to promulgate changes in Rule G and other operating rules.

Rule G applies to all employees while the FRA regulations cover only employees who perform service subject to the Hours of Service Act (45 U.S.C. §§ 61 *et seq.*). 49 C.F.R. § 219.5(d) and (e).[10] The FRA regulations prescribe "minimum Federal safety standards for control of alcohol and drug use," with respect to covered employees, and expressly do not "restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with" those regulation. 49 C.F.R. § 219.1(b). In our view, enforcement of Rule G is not limited by Fourth Amendment doctrines, and thus can be more flexible and responsive to general as well as to particular problems and to conditions that exist on the particular carrier. Indeed, the Ninth Circuit's holding that the "focus of . . . inquiry" is the same under the Fourth Amendment and under the RLA is in itself a very important issue. The adoption of safety regulations by the FRA is a time-consuming process, and those regulations are drafted for application to all railroads. Unless hampered by the decision below in this case, an individual railroad under the RLA may tailor its enforcement of Rule G to the severity of its problems with alcohol or drug impairment without substantial delay. If an improved means of detecting employees under the influence of drugs should be developed, for example, the decision below could substantially delay the use of that new means by a railroad pending exhaustion of the long and drawn out major dispute procedures of the RLA.

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[10] This includes employees "actually engaged in or connected with the movement of any train," 45 U.S.C. § 61(b)(2), dispatchers and other employees participating in the transmission of orders affecting train movements, 45 U.S.C. § 63(a), and employees "engaged in installing, repairing or maintaining signal systems." 45 U.S.C. § 64(d). It does not include, among others, maintenance of way employees who primarily maintain railroad tracks and mechanical employees who primarily maintain or repair locomotives, cars or other railroad equipment (apart from signal equipment).

In short, it is in the interest of the NRLC and member railroads to urge this Court to grant the petition and reverse the decision below, regardless of what this Court may do in the *Burnley* case.

REASONS FOR GRANTING THE WRIT

The decision below squarely conflicts with a decision by the Eighth Circuit in regard to an important issue, and the Ninth Circuit has wrongly decided that issue in a manner that also raises important questions about the application of the RLA in circumstances where there is no express provision either authorizing or prohibiting a railroad's disputed actions in any applicable written collective bargaining agreement.

A. There Is A Conflict of Decision by Two Courts of Appeals in Regard to an Important Issue.

As Judge Alarcon stated in dissent to the decision below (Pet. App. at 13a), the "majority's opinion is contrary to the Eighth Circuit's well-reasoned analysis of precisely the same issue" in the *BMWE* case (see p. 6 *supra*); apart from the identity of the union challenging the BN's post-accident testing program, "the facts and legal questions are identical," so that the "majority's opinion creates an intercircuit conflict." Those decisions address a recurring issue. For example, the Chicago and North Western has adopted a post-accident testing program similar to the BN program at issue here. All the major rail labor unions, including BLE and BMWE, have sued to enjoin that program. *Railway Labor Executives' Association* v. *Chicago and North Western Transportation Company*, Case No. 87-CV-60302AA (E.D. Mich.), which is now pending.[11]

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[11] The BN has cited a number of district court decisions which reached conflicting decisions in regard to an air or rail carrier's unilateral adoption of new alcohol or drug tests. Pet. at 14-16. See, also, *Southern Pacific Transportation Co.* v. *Locomotive Engineers*,

We have shown (pp. 8-10 *supra*) that the enforcement of Rule G is important to the safety and efficiency of railroad operations, which in turn is important to railroad passengers, shippers, employees and to the general public as well as to the railroads. Moreover, resolution by this Court of that intercircuit conflict has an additional importance. Most major railroads operate in more than one circuit, and separate crafts or classes of their employees generally have separate union representation. The existence of conflicting lines of authority in the lower courts not only will invite litigation, but could also result—as already has happened to the BN—in the same program for enforcing the same Rule G by the same railroad being enjoined in one circuit as to one union but not in another circuit as to another union. Permissible techniques for detecting possible on-duty alcohol or drug impairment could vary in regard to different crew members involved in the same human-factor accident, for example, depending upon which union is an employee's representative.

One of the advantages of having such controversies decided by the NRAB, as would be done under the Eighth Circuit's decision, is that "[p]recedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity . . . throughout the nation's railway system." *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 243 (1950). Now, only this Court can assure that 'desirable degree of uniformity" by resolving the conflict created by the Ninth Circuit, reversing the decision below, and ruling that such disputes over the implications of past practices in enforcing Rule G are arbitrable by the NRAB. Thus, review of that decision obviously is important to the future application of the RLA to other railroads and rail-

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96 Labor Cases ¶ 14,016 (N.D. Cal. 1980), which held that the BLE's objections to the railroad's unilateral use of intoxilyzer tests to detect violations of Rule G created a minor dispute.

road unions as well as to the BN and the BLE. In addition, the same kind of issues can arise in regard to the airlines and their unions that also are subject to the RLA. 45 U.S.C. §§ 181 *et seq.*

B. The Decision Below Raises Important Issues as to the Interpretation of Past Practices in Circumstances Where There Is No Applicable Written Collective Agreement.

Both Rule G and the means for enforcing that rule heretofore have been established by the BN unilaterally, and are not part of an express collective bargaining agreement with the BLE or any other union. We do not quarrel with the majority opinion below, however, insofar as it pointed out that a "railroad collective agreement includes not only express terms, but terms implied by past practice and by law" (Pet. App. at 8a), and acknowledged that the "arguably justifiable" test is applied by the courts in separating minor from major disputes regarding the implications of past practice as well as in other circumstances (Pet. App. at 9a). But as Judge Alarcon stated in dissent (Pet. App. at 13a), after "correctly stating the applicable test, the majority proceed[ed] to ignore it."

The court below should have focussed upon the record evidence of BN's past practices in enforcing Rule G, including evidence that historically that Rule has been enforced by various means deemed appropriate by the carrier. If that had been done, that Court should have concluded, as did the Eighth Circuit, that this evidence at least arguably supports BN's contention that its more effective enforcement measures are permissible under an implied term in its agreements with the union and therefore sent the matter to arbitration as a minor dispute under the RLA. Instead, the majority below focussed its inquiry, not on whether BN's arguments from past practice were too frivolous or insubstantial even to merit

consideration by an adjustment board, but rather upon "the expectation of privacy of those who will be subject to urine testing." We assume that such a "focus" to some extent may be appropriate "under the fourth amendment," but there is no support whatever of which we are aware for the proposition that it is equally appropriate in applying the "arguably justifiable" test in regard to 'an implied provision of a collective agreement . . . ." See Pet. App. at 11a.[12]

The majority below acknowledged that "BN is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment." Pet. App. at 11a. But the majority utilized its focus on the privacy interests of employees so as in effect to apply the restrictions of the Fourth Amendment to the private actions of the BN. It did so by issuing the *ipse dixit* that the "privacy interest is the same" regardless of whether measured by an employee's "expectations regarding whether the government may invade his or her privacy" or "whether an employer may engage in a similar invasion of privacy . . . ." Pet. App. at 11a. Hence, the majority below "decline[d] to assume that BLE members implicitly granted BN authority to invade their privacy in ways the government could not." *Ibid.* Insofar as appears, the majority did not even consider whether that bold proposition is at least "arguably" wrong. The majority cited no facts and no authority for thus equating an employee's expectations of privacy in dealing with his employer with his expectations of privacy in dealing with his government.

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[12] The court below cited *Shore Line* v. *Transportation Union, supra,* 396 U.S. at 153, for the proposition that "the terms of a collective agreement include 'actual, objective working conditions and practices, broadly conceived . . . .,' " but nothing in that proposition (or elsewhere in the *Shore Line* decision) either holds or suggests that a court should focus on employees' "expectation of privacy" in determining what those working conditions may be.

We do not believe and the record does not establish that the usual railroad worker (or union leader, or supervisor, or labor-relations officer) has an informed understanding of Fourth Amendment jurisprudence, or the same expectation of privacy *vis-a-vis* his or her employer as compared to governmental bodies. In short, we think that the Ninth Circuit's perceptions in regard to the privacy interests of railroad workers are unrealistic, as well as improperly embroiling the interpretation of past practices in the railroad industry with the complexities and permutations of Fourth Amendment jurisprudence.

But however that may be, this points up the fundamental error of the decision below—the usurpation by the court of the jurisdiction of the NRAB. The Congress in providing for arbitration of minor disputes "intended to leave a minimum of responsibility to the courts," for the very reason, among others, that the interpretation of collective agreements often requires consideration of "usage, practice and custom" which "must be taken into account and properly understood." *Order of Conductors* v. *Pitney*, 326 U.S. 561, 566, 567 (1946). The NRAB was created as "an agency especially competent" to deal with such issues. *Id.* at 567. "Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications." *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*, 339 U.S. at 243. Its members include "representatives of management and labor . . . peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world," as they are "in daily contact with workers and employers, and know[] the industry's language, customs, and practices." *Gunther* v. *San Diego & A. E. R. Co.*, 382 U.S. 257, 261 (1965).

Hence, the decision below establishes a precedent for avoiding the jurisdiction of the NRAB in the very area where its special competence is most important—where

there is no written agreement and decision turns altogether upon the implications to be drawn from custom and practice, including any relevant perception of the privacy expectations of railroad workers. That precedent, if allowed to stand, undermines the role that the Congress intended the NRAB to perform in regard to resolving a wide range of railroad labor-management controversies in addition to controversies over the enforcement of Rule G. The decision below, therefore, is of general importance to the operation of the RLA and should be reviewed by this Court.

CONCLUSION

For the reasons stated above and in the BN's Petition, this Court should grant a writ of certiorari and review the decision by the Ninth Circuit.

Respectfully submitted,

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No. 87-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICI CURIAE SUPPORTING CERTIORARI

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QUESTIONS PRESENTED

The Airline Industrial Relations Conference ("AIR Conference") and the Air Transport Association ("ATA") submit this brief as amici curiae in support of the petition for certiorari filed by Burlington Northern Railway Co. ("BN") on April 1, 1988.* This case presents two questions whose resolution will vitally affect the ability of AIR Conference's and ATA's member air carriers to safeguard the flying public against the dangers created by drug use among employees. BN has requested that this Court determine whether a rail or air carrier that has historically enforced a safety rule prohibiting drug and alcohol abuse can implement more effective detection measures without precipitating a "major dispute" subject to the lengthy dispute resolution procedures of the Railway Labor Act. BN also has asked the Court to decide whether the right to implement a drug testing program is an implied in law term of a collective bargaining agreement.

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* Lists of AIR Conference and ATA members are attached as an appendix to this brief. The parties herein have consented to the filing of the amici curiae brief. Copies of their consent letters have been filed with the clerk.

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BRIEF OF THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND THE AIR TRANSPORT ASSOCIATION OF AMERICA AS AMICI CURIAE SUPPORTING CERTIORARI

THE INTEREST OF THE AMICI CURIAE

The AIR Conference and ATA have a substantial interest in the disposition of this petition for certiorari. AIR Conference is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters, and to represent the member carriers with respect to legislative, judicial and administrative matters in these areas in the airline indus-

try. ATA is the Washington-based trade and service association of United States air carriers, with responsibilities, among others, to coordinate safety and operational concerns of the member carriers.

This case raises issues of extraordinary concern to all of AIR Conference's and ATA's members. BN has petitioned the Court to review a Ninth Circuit decision holding that the railroad could not institute post-accident testing of employees for possible drug use until it engaged in negotiations with the union. Most air carriers have or are considering implementing a drug detection policy similar to the BN's policy. Past practice of the parties in the airline industry demonstrates that the carriers have always exercised the exclusive right to enforce drug detection policies.

The great public need for drug testing of airline employees is underscored by the actions of the federal government. The Federal Aviation Administration has instituted a rulemaking procedure on drug policies for air carriers, which proposes mandatory post-accident/incident testing of airline employees. 53 Fed. Reg. 8368-88 (1988). The carriers believe that their ability to enforce or implement post-accident testing policies is essential in discharging the obligation imposed upon them by the Federal Aviation Act to provide the "highest possible degree of safety" to the flying public. 49 U.S.C. §1421(b) (Supp. 1987).

AIR Conference and ATA wish to provide this Court with an industry-wide perspective on the issues raised by the petition. The instant brief will describe the vital need for effective carrier measures that will prevent the slightest degree of danger to the traveling public from drug use. The brief reviews current carrier drug control policies, and the origins of those policies outside the collective bargaining processes. AIR Conference and ATA present the industry's view as to why their obligation to preserve air

safety necessitates that the carriers retain the right to implement and utilize the most effective methods for detecting employee use of drugs. The following brief will illustrate that the issues Burlington Northern petitions this Court to resolve have continuing, vital importance to the air transportation industry.

STATEMENT

1. Air Safety and Problems of Employee Drug Use

Since the airline industry was economically deregulated in 1978, air traffic has increased dramatically. There were 1,478,591 more aircraft departures in 1986 than in 1977, and 178,167,000 more passengers flown.[1] The operational difficulties caused by this tremendous increase in traffic, and the burdens imposed upon airports and air traffic control capacities, have been well-publicized. To operate and maintain aircraft safely in this environment, airline employees must perform at peak mental alertness and physical capacity at all times. The increased flight schedules have caused a corresponding increase of nearly 120,000 in airline employment.[2] Each plane flown by an air carrier requires rotating crews utilizing approximately fifteen pilots and thirty-five flight attendants, and is serviced and maintained by numerous ground workers.

The increase in air traffic coincides with a growing national concern about drug abuse among transportation industry employees whose job performance affects passenger safety. The recent Trans Colorado Airlines crash, which killed nine people, shattered any illusions that drugs had

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[1] U.S. scheduled airlines had 4,936,519 scheduled departures in 1977 and 6,415,110 departures in 1986. The airlines carried 240,326,000 revenue passengers in 1977 and 418,493,000 passengers in 1986. Air Transport 1987, The Annual Report of the U.S. Scheduled Airline Industry ("ATA Report") at 1. Copies of the ATA Report have been lodged with the office of the Supreme Court Clerk for the Court's convenient reference.

[2] *Id.* at 12.

not infiltrated the airline workforce. Post-accident tests revealed that cocaine was present in the captain's blood. The recent Amtrak train collision, in which sixteen were killed and 170 were injured, illustrates the grievous consequences of errors in judgment caused by employee use of drugs or alcohol. A drug-related catastrophe in the airline industry can take a far greater toll than an accident in other forms of transportation. Air disasters have claimed as many as 581 lives in a single incident.

Carriers involved in such disasters are subject to staggering liabilities. In one case a jury awarded $7.9 million in compensatory damages to the estate of a corporate executive who was killed in a commercial plane crash.[3] Recent settlements have reached over $800,000.00 per passenger in cases in which there were claims of carrier negligence.[4] Carriers are justifiably concerned about the extensive damages which a jury can impose in crash-related litigation. Carriers that fail to conform to Federal Aviation Administration ("FAA") safety standards also can incur steep penalties and/or loss of their certifications.

2. The Federal Aviation Act Public Safety Mandate

In formulating all safety policies, including those relating to drug use, carriers are guided by the Federal Aviation Act public safety mandate. This mandate imposes upon carriers a duty to maintain public safety independent of the regulatory responsibilities of the FAA. The Federal Aviation Act provides that "the [FAA] Administrator shall give full consideration to the duty resting upon air carriers

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[3] A federal jury awarded $7.9 million to the estates of IBM executive Phillip Estridge and his wife who were killed in a 1985 Delta Airlines crash. *Wall Street Journal*, March 22, 1988 at 7.

[4] Settlements in the 1982 Air Florida crash at Washington, D.C. National Airport averaged over $800,000.00 per passenger.

to perform their services with the *highest possible degree of safety in the public interest. . . .*" 49 U.S.C. § 1421(b) (emphasis added).

Several circuits have recognized that this independent Congressional mandate justifies broad deference to air carrier safety measures. In upholding an age-forty cutoff for second officer applicants, the District of Columbia Circuit rejected an argument that the low probability of safety hazards was insufficient justification for the hardship to rejected individuals, reaffirming that a carrier must avert the slightest potential danger:

> As an air carrier with a public duty to operate with the highest degree of safety, [a carrier] is in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is the essence of [a carrier's] business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), *quoting Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413, 434 (N.D. CA. 1977), *aff'd in relevant part*, 649 F.2d 670 (9th Cir. 1980). *See also Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236, n.30 (5th Cir. 1976) (employers must be accorded great leeway and discretion in determining the manner in which they may operate safely).

In *Mulholland v. Department of the Army*, 660 F. Supp. 1565 (E.D.VA. 1987), the court sustained a drug test policy for employees holding aviation-related positions:

> Because of the sensitive nature of flight patterns and congestion around the Washington, D.C. area, mechanical reliability of these helicopters is crucial. The duties of aircraft mechanics and refuelers demand continuous concentration, alertness, exacting meas-

> urements, and attention to detail with minimal supervision. Considering the prevalence of drug usage in our society and the workplace, and the subtle and perilous present and after effects on the users' physical, mental and emotional states, it is not only acceptable but imperative that this random urine testing conducted under proper procedures be required for certain sensitive positioned employees such as plaintiffs who are responsible for numerous lives. Recent cases particularly have demonstrated that employees in dangerous and/or highly visible occupations, which involve the safety, well-being, and integrity of the public, are and should be held to a higher standard of care than other less conspicuous, non-safety related positions.

660 F. Supp. at 1570.

Under the Federal Aviation Act, carriers are responsible for the performance of their employees, such as pilots and mechanics. The FAA regulations require carriers to make "[p]roper evaluation of pilot performance including the detection of . . . [p]ersonal characteristics that could adversely affect safety." 14 C.F.R. §121.413(a)(4)(ii). The FAA regulations also prohibit service by a crew member while "using any drug that affects the person's faculties in any way contrary to safety." *Id.* §91.11(a)(3). This two-pronged air safety approach clearly dictates that carriers have and utilize the most effective methods for detecting drug usage by their employees.

3. Carrier Drug Detection Policies

To prevent drug-related disasters, all carriers have adopted drug detection programs for their employees. Most carriers have implemented employee assistance programs to enable workers to seek rehabilitation for drug problems. Most carriers offer reinstatement, generally with no loss of seniority, to an addicted employee who volunteers to enter

an EAP rehabilitation program before they are caught violating the prohibitions on drug use.

However, the carriers have found that many employees with drug or alcohol problems do not voluntarily come forward. Consequently, the airlines have had to implement testing procedures to detect recalcitrant abusers of drugs and alcohol. The first test occurs at the pre-employment phase, so that "high risk" candidates never enter the workforce. For pilots, there is periodic testing when they undergo regular medical checkups. Many employees must undergo drug testing as part of their physical examination after they have been on furlough or extended leave. Most airlines utilize reasonable cause/probable suspicion testing of workers. A majority of the carriers also require that employees submit to drug testing following an accident or incident, provided the affected workers were in a position to control or avert the accident.

These drug testing programs clearly can have a deterrent effect on drug users and potential users. *See Airline and Rail Service Protection Act of 1987: Hearing on S. 356 and S. 362 Before the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 1st Sess.21 (Feb. 20, 1987) (Statement of Hon. Elizabeth H. Dole, Secretary, Department of Transportation); S. Rep. No. 43, 100th Cong., 1st Sess.3 (1987). Several air carriers have found that the increased use of pre-employment drug testing has led to a steady decrease in the percentage of applicants who test positive.

The carriers have always implemented their drug control rules unilaterally. No carrier has ever established through collective bargaining its policy concerning the use of drugs by any group of its workers. Equally important, no carrier has ever negotiated concerning the types of testing or other methods of detection to be utilized to enforce the rules. The only subject related to drug control on which

some carriers historically have bargained is the company's agreement to establish an EAP.

4. FAA Rulemaking Proceedings on Drug Control

The FAA has begun a rulemaking proceeding on drug control policies for airline employees. In the FAA's recent Notice of Proposed Rulemaking ("NPRM") on Airline Drug Control, the agency has proposed mandatory post-accident testing. 53 Fed. Reg. 8368, 8386 (March 14, 1988) (to be codified at 14 C.F.R., Part 121) (Docket No. 25148). However, the final rules may not necessarily include this provision and are unlikely to be operational until late 1989. Further, given the Ninth Circuit's decision in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (March 17, 1988), it is uncertain that the FAA rules would survive a court challenge.[5] Thus the FAA rulemaking proceedings may not resolve the issues raised in this case, as they relate to the airline industry.

The comments of the FAA in the preamble to the NPRM demonstrates the public policy considerations which underlie the need for drug testing of airline employees with safety responsibilities:

> The F.A.A. in its regulatory role has no evidence to suggest that the aviation community differs significantly from the overall population in terms of drug abuse. The public expects, and is entitled to, a drug-free environment in those aviation activities that involve their personal safety. Allegations that certain air carrier crewmembers have used illegal drugs have raised questions about the overall degree of drug abuse in the industry and whether crewmembers are flying

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[5] The same Ninth Circuit majority that decided the instant case ruled in *RLEA v. Burnley* that mandatory drug testing under the Federal Railroad Administration regulations was an unconstitutional violation of the Fourth Amendment.

> after having used drugs, and thus jeopardizing the personal safety of passengers and others.

53 Fed. Reg. at 8369.

The presence of the post-accident testing provision in the NPRM underscores the safety need for such detection methodology. Under the proposed rule, employers would be required to obtain urine samples from "sensitive safety and security-related employees whose performance contributed to an accident." *Id.* at 8375. The FAA emphasizes the importance of testing "quickly so that the tests can be administered while evidence of drug use, if any, is still in the employee's system." *Id.* at 8376.

ATA, in its comments to the FAA on the Advance Notice of Proposed Rulemaking endorsed post-accident testing. Although most airline union commenters opposed any form of testing, it is notable that the Air Line Pilots Association ("ALPA"), the primary labor organization for commercial airline pilots, did not oppose post-accident testing, provided certain safeguards are incorporated.[6]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER CARRIERS CAN IMPLEMENT ENHANCED DRUG DETECTION PROCEDURES WITHOUT TRIGGERING THE "MAJOR DISPUTE" PROCEDURES OF THE RAILWAY LABOR ACT.

Under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), a court's power to grant injunctive relief depends on whether the controversy before it constitutes a "major" or "minor" dispute. A major dispute relates to disputes over changes in rates of pay, rules or working conditions,

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[6] "ALPA Airs Its Concerns," *The Air Line Pilot* at p. 31 (March, 1988). *See also* 53 Fed. Reg. at 8371.

while a minor dispute relates to the interpretation or application of existing agreements. *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S 711, 722-24 (1945); *Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323 (D.C. Cir. 1967).

The appropriate test in determining whether the admitted change is a "major" or "minor" change is whether the change is *arguably* justified by the parties' collective bargaining agreement. If the Court determines that the collective bargaining agreement reasonably affords some arguable basis for the change, the dispute is "minor" and the Court must then defer the interpretation of the contract to the arbitral tribunal (System/Adjustment Board).

> The key word in this test is "arguable." If the Court finds an arguable basis it must defer to the expertise of the Adjustment Board. . . . The true meaning . . . of the memorandum is the grist of arbitration.
>
> . . .
>
> . . . We again point out that controversy over such changes constitutes a minor dispute if provisions for settling such a dispute are arguably contained within the collective bargaining agreement.

REA Express Inc. v. Brotherhood of Railway, Airline and Steamship Clerks, 459 F.2d 226, 228 (5th Cir.), *cert. denied*, 409 U.S. 892. (1972). Further, because a "major" dispute can escalate into a strike, if there is any doubt as to whether a dispute is "major" or "minor," that doubt should be resolved in favor of finding a "minor" dispute. *Brotherhood of Locomotive Engineers v. Atchison, T. & S.F. Railway*, 768 F.2d 914, 920 (7th Cir. 1985).

As Petitioner has indicated, the Ninth Circuit's decision herein directly conflicts with the Eighth Circuit's decision in *Brotherhood of Maintenance of Way Employees v. Burlington Northern*, 802 F.2d 1016 (8th Cir. 1986) ("BMWE"). There, the Eighth Circuit ruled that BN's im-

plementation of the *same* post-accident testing program at issue here constituted a "minor" dispute, to be resolved in arbitration.

In *BMWE*, the Eighth Circuit noted that the union in the past had voiced little objection to the railroad exercising its prerogative to remove from service an employee, where common-sense observation of that employee suggested that he/she was impaired. The Eighth Circuit found that since suspicion of impairment was still required, "the ground rules between the union and the railroad [had] not changed significantly . . ." 802 F.2d at 1023.

Conversely, the Ninth Circuit treated the post-accident testing program as a marked deviation from the prior ground rules between the parties: "BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and thus, by definition, a major dispute." 838 F.2d at 1039.

These opposing views have begun to spill over into the district courts. Federal courts in Texas and Pennsylvania have adopted Ninth Circuit reasoning and enjoined drug testing programs. *Transport Workers Union v. Southeastern Pennsylvania Transportation Authority*, 678 F. Supp. 543 (E.D.PA. 1988), *appeal docketed*, No. 88-1177 (3d Cir. Feb. 18, 1988) (random drug testing); *International Brotherhood of Teamsters v. Southwest*, No. CA3-86-3103-R (N.D.TX. 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) (post-accident testing). In contrast, district courts in the District of Columbia and Washington State have ruled that drug testing constituted a "minor dispute." *International Association of Machinists v. Trans World Airlines*, 663 F. Supp. 230 (D.D.C. 1987) (enhanced drug testing procedures); *Airline Pilots Association v. Alaska Airlines*, No. C87-353-R (W.D.WA. 1987), *appeal docketed*, No. 87-4167 (9th Cir. September 9, 1987) (medical examination and reasonable cause testing.)

This split among the circuit and district courts results from the failure of the Ninth Circuit and certain district courts to properly recognize their limited role in deciding "major" versus "minor" cases. As with other courts before it, the Ninth Circuit succumbed to the temptation to "interpret" the contract. The Ninth Circuit found that the implied contract/past practices of the parties could only be interpreted as permitting the carrier to utilize "non-intrusive" techniques for enforcing its drug and alcohol rules. But contract interpretation is the very job that Congress has delegated to arbitrators and has removed from the courts.

The Ninth Circuit's reading of the BN-BLE implied contract provision may in fact prove to be accurate. However, at this stage, that is irrelevant. It is not within the province of the court to determine which methods of detection the contract permits. That is for the arbitrator to decide. The only area of inquiry for the court is to determine whether the carrier's claimed contractual justification is "frivolous" or "obviously insubstantial." *Southern Railway Co. v. Brotherhood of Locomotive Firemen and Enginemen, supra.* Far from being "obviously insubstantial," the conclusion that past practices grant BN the latitude to implement refined techniques for detecting drug usage is compelled by the fact that rail and air carriers have traditionally kept enforcement of their drug and alcohol policies within their exclusive control.

The petition in this case adequately demonstrates the conflict among the circuits regarding the proper scope of the "major" versus "minor" distinction, and amici will not belabor the point. More important from AIR Conference's and ATA's perspective, however, is the effect that the split will have on carrier's ability to enforce drug use prohibitions. Most of the major air carriers operate in all twelve circuits. The airlines cannot cope with a scenario in which a pilot who creates a mishap while in Minneapolis can be tested, but not if the same incident occurs while

he is in Los Angeles. Nationwide uniformity in airline labor relations matters has been a longtime pillar of federal policy. The RLA has consistently been construed to provide for nationwide/system-wide crafts or classes. *International Brotherhood of Teamsters v. Texas International Airlines*, 717 F.2d 157 (5th Cir. 1983); *Air Cargo, Inc.*, 10 NMB 166 (1983). Likewise, the airline industry, with the exception of a few workers, is exempt from the overtime provisions of the Fair Labor Standards Act. 29 U.S.C. §213(b)(3) (Supp. 1987). It is equally imperative that the law which governs carriers drug control policies be uniform nationwide.

II. THE NINTH CIRCUIT'S NOVEL APPLICATION OF THE FOURTH AMENDMENT TO PRIVATE EMPLOYERS ENDANGERS PUBLIC SAFETY.

Although acknowledging that BN "is not a government agency and, therefore, is not subject to the restrictions of the fourth amendment," the Ninth Circuit effectively applies the constraints of the fourth amendment to the railroad. 838 F.2d at 1092. Referencing the fourth amendment, the court finds that "the focus of our inquiry—both under the fourth amendment and under an implied provision of a collective agreement—is the expectation of privacy of those who will be subject to urine testing." *Id.* The court then proceeds to "decline to assume that BLE members granted BN the authority to invade their privacy in ways the government could not." 838 F.2d at 1093.

The Ninth Circuit's novel imposition of fourth amendment right of privacy concepts to a private employer is without judicial precedent. Equally important, the decision impedes the carrier's ability to maintain safety in the workplace. Finally, the decision is incompatible with the realities of the workplace of airline employees.

The principal reason for any drug and alcohol testing program in a public transportation setting is to identify unfit and potentially unfit employees so that public safety

is not adversely impacted. Drug and alcohol testing thus is an important part of an air carrier's public safety obligations. In view of the indisputable requirement that aircraft be operated in the safest possible manner, free from the potential catastrophes that can result from drug use by airline employees, no one can reasonably argue that drug testing policies, including post-accident testing, is not an essential part of its public safety obligations.

Contrary to the Ninth Circuit's implicit holding that mandatory drug testing necessarily violates an employee's right of privacy, federal courts have sustained drug testing policies in a number of safety related settings. For example in *Amalgamated Transit Union, Division 241 v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976), the court sustained, against constitutional challenge, a rule requiring bus drivers to submit to blood or urine tests following involvement in a serious accident or when they were suspected of being intoxicated or under the influence of narcotics. The court said:

> In this case, the CTA has a paramount interest in protecting the public by ensuring that bus and train operators are fit to perform their jobs. In view of this interest, members of plaintiff Union can have no reasonable expectation of privacy with regard to submitting to blood and urine test.
>
> . . . .
>
> Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse.

Id. at 1267.

In *National Treasury Employees Union v. Von Rabb*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879), the Fifth Circuit sustained a rule that required employees to undergo uri-

nalysis as a precondition to transfer to other positions. The Court relied in part on the safety-sensitive nature of some of the jobs:

> Finally, those employees involved in field operations, particularly if carrying firearms, endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use. Like other public agencies, the Customs Service has a strong interest in ensuring that its employees operate effectively.

Id. at 178. *See also Mulholland v. Department of the Army, supra.* Notably, these three cases all involved government employees, to which the fourth amendment clearly applies.

Further, we would note that post-accident testing, which the Ninth Circuit disapproves of, is less subjective than the surveillance based testing, which the Ninth Circuit sanctioned. Post-accident testing is based on discrete, objective incidents—*i.e.*, an accident involving carrier equipment. The use of on-the-job accidents to trigger the testing requirement is manifestly fair because it limits testing to incidents that may be an indication of employee impairment and it eliminates subjectivity and supervisory discretion.

The Ninth Circuit apparently takes the position that there must be individualized suspicion, based upon "sensory surveillance," before drug testing is proper. Such a position is factually and scientifically unsound. As the Eighth Circuit found in *BMWE*, it is difficult to detect through visual observation whether an individual is impaired by drugs:

> The intoxicating effect of these substances is said to be primarily mental or emotional; a user's judgment or clearheadness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that

> too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene.

802 F.2d at 1020.

The claim that individualized suspicion should be required as a prerequisite to drug testing, was specifically rejected by the Fifth Circuit in *Von Raab*:

> It is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens.

816 F.2d at 179. As in *Von Raab*, carriers should not be required to wait until it observes a staggering employee—or experiences a catastrophe—before it can test its pilots and other employees for drugs.

Scientific studies corroborate these judicial determinations that drug usage often does not produce outward manifestations, while still impairing employee performance. In Yesavage, *Carry Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142:11 Am. J. Psychiatry 1325 (November, 1985), the authors tested pilots on a simulator. They noted that "[a]t 24 hours [after marijuana ingestion], there were trends in all variables toward impaired performance." *Id.* at 1328. They further noted that "[o]ne of the pilots did land off the runway 24 hours after THC ingestion." *Id.* They concluded as follows:

> The current data, from an even more complicated test, indicate impaired performance 24 hours after smoking THC . . . These results suggest a need for concern about the performance of those en-

> trusted with complex behavioral and cognitive tasks within 24 hours after smoking marijuana. The subjects in this experiment were unaware of any affects on their performance, mood, alertness, etc. Some results may be applicable to other tasks, such as operating complicated heavy equipment or railway trains and switching procedures.

Id.[7]

Finally, the Ninth Circuit's inference that drug testing invariably conflicts with transportation workers' expectations of privacy is without foundation. To the contrary, workers generally cannot even enter the airline industry without first undergoing mandatory drug testing. As previously noted, almost all U.S. carriers require pre-employment testing before they will hire a job applicant. Once on the job, pilots must undergo drug testing as part of their semi-annual physical examinations. Many airline workers must undergo drug testing as part of their physical examinations when they return to work after a furlough or prolonged leave. Likewise, reasonable suspicion and post-accident testing are already common practice at most U.S. carriers.

CONCLUSION

The import of this case revolves around one central theme—the right of the public to be safe and secure when they travel on our national transportation system, be it by plane, train or bus. If airlines and other transportation

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[7] *See also* Chaite, Fishman & Schuster, *Hangover Effects the Morning After Marijuana Smoking*, 15 Drug and Alcohol Dependence 229 (1985) (noting that "present results do suggest that marijuana smoking in the evening can result in measurable changes in behavior the next morning" and concluding that "even subtle changes in mood or behavior could have significant practical consequences for the many people who use marijuana believing that the drug will have no residual effects on the following day"). *Id.* at 236-37.

carriers retained employees who use illegal drugs, the integrity of their operations in the eyes of the public would be seriously compromised. To maintain public trust and satisfy their obligation under the Federal Aviation Act, air carriers have necessarily utilized drug testing, including post-accident testing. Airline unions and employees recognize that enforcement of drug policies, including the choice of detection methods, has traditionally been a subject of management prerogative, and outside the scope of the collective bargaining agreement. Under these circumstances, the Ninth Circuit's distorted reading of the "major versus minor" test and employees' right of privacy, cannot be sustained. The public interest in safe transportation must prevail.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted

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April 29, 1988

APPENDIX

APPENDIX

ATA Members

Alaska Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Braniff, Inc.
Continental Airlines, Inc.
Delta Air Lines
DHL Airlines
Eastern Air Lines, Inc.
Evergreen International Airlines
Federal Express Corporation
The Flying Tiger Line, Inc.
Hawaiian Airlines
Midway Airlines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.
Southwest Airlines
Trans World Airlines, Inc.
United Airlines, Inc.
United Parcel Service
USAir, Inc.

Associate Members

Air Canada
Canadian Airlines International

AIR Conference Members

Airborne Express, Inc.
Alaska Airlines, Inc.
Aloha Airlines, Inc.
America West Airlines
American Airlines, Inc.
Braniff, Inc.
Continental Airlines, Inc.
Eastern Air Lines, Inc.
Federal Express Corporation
The Flying Tiger Line, Inc.
Midway Airlines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines
Reeve Aleutian Airways, Inc.
Tower Air
Trans World Airlines, Inc.
United Airlines, Inc.
United Parcel Service
USAir, Inc.
World Airways, Inc.